Supreme Court, U.S.
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85-1929

No.

In The
Supreme Court Of The United States

October Term, 1985

Kondian R. Rajaram,
Petitioner,

v.

A.S. Abell Publishing Company,
Respondent

and
International Typographical Union;
Baltimore Typographical Union No. 12;
Sunpapers Chapel of
Baltimore Typographical Union No. 12;
Jack Poist; Gary Kidwell;
Defendants

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

Petitioner's Petition For A Writ Of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Is the issuance of a certificate under Fed. R. Civ. P. 54(b) erroneous when the district court is aware that unresolved claims are pending in another case before it which includes the same parties and the court is aware that such other case could be decided to have sufficiently similar factual underpinnings to indicate that the other case before it could be joined with the case upon which judgment is being rendered?

2. Is the issuance of a certificate under Fed. R. Civ. P. 54(b) erroneous when it is made for the convenience of the requesting party and the issues may be effectively reviewable on appeal from final judgment?

3. Is the issuance of a certificate under Fed.R.Civ.P. 54(b) erroneous prior to discovery being available from the party moving for such certification,

particularly in a case wherein allegations of misrepresentation, fraud, fraudulent concealment and conspiracy have been alleged and more particularly wherein an alleged co-conspirator remains in the case as a defending party?

4. Is the issuance of a certificate under Fed.R.Civ.P. 54(b) to be granted because a determination of dismissal of a defending party was one of the first dispositive developments in a protracted litigation?

5. For limitations purposes, if employees are suspicious or dissatisfied when an agreement is reached between the employer and their union, is such suspicion or dissatisfaction sufficient to require each employee to then immediately launch an individual personal inquiry into all facts and circumstances which led to such agreement?

6. For limitations purposes, when

it is alleged that a union is a co-conspirator with the company, is the time that a defendant union has knowledge of wrongdoing by the defendant company properly imputed to each union member?

7. Is it proper for the court to make a final determination where there are disputed questions of fact regarding tolling of the statute of limitations under the doctrine of fraudulent concealment or where there are disputed questions of fact regarding when a plaintiff knows or has reason to know of his injury?

8. When a company violates a statutory requirement of notifying its employees of their rights under federal law, should the court deny or severly restrict a plea of "limitations" as a defense to claims against it?

9. When a company violates a statutory requirement of notifying its employees of their rights under federal law,

does an employee suffer recoverable damages by having to retain an attorney to learn about such rights and by being prejudiced when later bringing a claim against his employer to an appropriate agency or to court?

10. When a party does not agree to the assigning of a case to a magistrate, is he obligated to later file an objection to a recommendation leading to an interlocutory order of the district court in order to avoid waiver of appellate review?

11. Is it error for the court to require a lesser degree of knowlege to begin the running of the statute of limitations for a claim of fraud or fraudulent concealment than that required to satisfy the technical requirements of stating such an action?

12. Is it error for a court which receives the following evidence to conclude that it is insufficient to prevent a summary determination on the merits of the issues of fraud or fraudulent concealment: (a) During an arbitration hearing, an employer agreed to be bound by the arbitrator's determination without regard to the expired status of the collective bargaining agreement; (b) the employer decided to not honor its agreement after the arbitrator rendered his determination; (c) payments were made by the employer to beneficiaries of the arbitration award which were knowingly <u>not</u> in full payment thereof coupled with statements by the employer that such payments <u>were</u> in full compliance with said award; (d) it is stated that an employee who was not informed about said employer's agreement is misled by the checks and statements into inaction; and, (e) the

employee later learns about said agreement only after personally obtaining a copy of the transcript of the arbitration hearing?

13. When a court rules that technical requirements of stating allegations of fraud or fraudulent concealment are not satisfied, should amendment be permitted or discovery be compelled to enable a plaintiff to acquire additional factual information if requested prior to final dismissal of the claims?

14. Where it is apparent from the pleadings that a company was unjustly enriched at the expense of its employees or that a company was involved in wrongdoing which resulted in injuries and damages to its employees, should a court use its equity powers to promote justice?

15. Does the mere intoning of some exculpatory words by an employer who adopts the provisions of a union constitution and

by-laws relieve the employer from all responsibility for violations of employees' rights inherent in the terms of such constitution or by-laws?

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No.

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Petition For A Writ Of Certiorari
To The
United States Court of Appeals
for the Fourth Circuit

Kondian R. Rajaram petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit decided on January 9, 1986.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit without oral argument affirmed the order of the district court on January 9, 1986. (A copy of that unpublished opinion is attached at Appendix page 1a., and is officially reported at 782 F.2d 1036 [4th Cir. 1986].)

The United States Court of Appeals for the Fourth Circuit on February 25, 1986 denied Petitioner's Motion for Rehearing. (A copy of the denial is attached at Appendix page 109a.)

In the beginning, this case was assigned to a magistrate without agreement of Petitioner. On November 6, 1983, the United States District Court for the District of Maryland adopted the first report and recommendation of the magistrate and ruled that some of Petitioner's discrimination, L.M.R.A. and L.M.R.D.A.

claims against his unions were to be dismissed and that Petitioner's claims against Respondent A. S. Abell Publishing Company were to be dismissed. (A copy of the November 6, 1983 ruling is attached at Appendix page 42a, and the related magistrate's report and recommendation is attached at Appendix page 21a.)

Petitioner, alleging new evidence, later moved that the earlier interlocutory order be revised in regard to Respondent. On February 8, 1985, the United States District Court for the District of Maryland adopted the recommendation of the magistrate and ruled that Petitioner Rajaram in his Motion had failed to meet the technical requirements of pleading fraud or fraudulent concealment against Respondent with regard to newly discovered evidence and further ruled that final judgment in favor of A. S. Abell Publishing Company be granted under Fed.R.Civ.

P. 54(b). (A copy of the District Court ruling is attached at Appendix page 85a and the related magistrate's report and recommendation is attached at Appendix page 47a.)

Additionally, another case (District Court Case Number B-84-2465), which involves Petitioner Rajaram as a plaintiff and Respondent A. S. Abell Publishing Company as a defending party, was pending simultaneously and has been determined by the same District Court as being related to the instant case. In the "related" case (which was removed by the defendants from the Maryland State Court) the magistrate, after referral, decided that said case presented a federal question and Ordered, on February 1, 1985, that it not be remanded as requested. (A copy of the magistrate's order is attached at Appendix page 62a.)

In his report and recommendation in regard to motions to dismiss or for

summary judgment, the magistrate noted that the removed case should have been joined with the instant case and recommended judgment against Petitioner due to the res judicata affect of final judgment in the instant case. The District Court adopted the magistrate's recommendation on April 21, 1986. (A copy of the District Court ruling is attached at Appendix page 105a and the related magistrate's report and recommendation is attached at Appendix page 88a.)

The rulings of the District Court in regard to case number B-84-2465 are now in the process of appeal to the United States Court of Appeals for the Fourth Circuit. (A copy of the Notice of Appeal is attached at Appendix page 150a.)

GROUNDS OF JURISDICTION OF THIS COURT

Date of judgment to be reviewed and jurisdiction of this Court:

It is requested herein that this Court review a judgment of the United States Court of Appeals for the Fourth Circuit which was decided on January 9, 1986.

Petitioner's motion for rehearing to the United States Court of Appeals for the Fourth Circuit was denied on February 25, 1986.

Jurisdiction is conferred on this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit by writ of certiorari through the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment 5:

> "No person shall...nor be deprived of life, liberty, or property, *without due process of law;...*"

Statutes involved in the opinion and order of the United States Court of Appeals for the Fourth Circuit and in this petition are 29 U.S.C. 185; 42 U.S.C. 1981; 42 U.S.C. 1994; 42 U.S.C. 1985; 42 U.S.C. 1986; 42 U.S.C. 2000e; 42 U.S.C. 2000e-2(a); 42 U.S.C. 2000e-5; 42 U.S.C. 2000e-10.

The Federal Rules of Civil Procedure involved in this case are: Rules 8(a), 8(c), 8(d), 8(e), 8(f), 9(b), 15(a), 15(d), 18, 54(b), 56(c) and 56(d).

The relevant portions of the mentioned statutes and rules are reproduced in the Appendix at pages 151a-175a and 176a-185a.

STATEMENT OF THE CASE

This case involves a complaint which was initiated pro se by Petitioner against his unions and several of its officers due to several alleged violations of Petitioner's rights by the unions. After obtaining legal advice, the complaint was amended to include Petitioner's employer, the Respondent herein.

On December 2, 1976 Petitioner was working at the A. S. Abell Publishing Company ("Abell" or "Respondent") in the position of a senior substitute proof-reader. This position had been attained after a four year apprenticeship and by working his way up the seniority list of substitutes with Abell. Respondent had allowed Petitioner to begin and continue his employment even though it was aware of technological advances that would allow a smaller work force. Abell had tested

Petitioner for his position, and accepted his employment even though it had superior knowledge of automation to be implemented. Under the 1974-76 collective bargaining agreement, and prior agreements, Abell had required Petitioner's unions to train substitute employees to have them available for its use as substitute employees. Also, while Petitioner was an apprentice, during a four-year period, only a fraction of a regular wage was paid him. The Respondent accepted union law as a part of its collective bargaining agreement with the Petitioner's unions. That union law provided that the substitute employees would move into regular positions of employment when the substitutes reached the top of the seniority list, and as regular positions opened up through attrition or other causes.

Petitioner on December 2, was working regularly in the place of a full-time

man, Mr. Fleisig, who had been absent and would continue to be absent for a long period of time. On December 2, a letter was written by a company executive, John Banach, which caused Petitioner and others to be removed from such long-term substitute positions. (Appendix page 194a) Petitioner's union objected to the removal of the substitute employees from their long-term jobs; no resolution to the dispute was agreed upon by the parties and they later agreed that the matter should be submitted to arbitration.

On December 31, 1976 the collective bargaining agreement between Abell and the unions expired. Employees' local union agreed that they would continue to work under provisions of the expired contract. Petitioner and other substitutes continued to show up for short-term substitute positions. At that time, Petitioner was

not informed there was an agreement to arbitrate the mentioned dispute over the Banach letter regarding long-term substitute jobs.

Hearings were held on the mentioned disputed matter before arbitrator, Myron L. Joseph. On September 7, 1977, the employees were still without a contract. Then the arbitrator ruled in favor of the substitute employees. The result of the award of the unpublished arbitration proceeding was that your Petitioner and other substitutes were to be placed back in the positions from which they were removed, to be paid back pay and that substitute employees should continue to be hired as per prior practice.

Other than that the issue in dispute was that of the "Banach letter", the circumstances and agreements between Abell and the unions surrounding the arbitration

and its hearing were not communicated to the affected employees. Thus, information about an expansion of the issues to be arbitrated beyond the contract expiration date was not provided to affected employees. Substitute employees were not informed of their right to continued employment. Petitioner was not informed of nor able to discover factual details of the circumstances and agreements between Abell and the unions surrounding the arbitration and its hearing until much later. The details that he later discovered are discussed below coincidently with the time of discovery.

In July of 1978 all of Abell's substitute employees are informed, by union representatives and Abell, that their positions are being effectively terminated and that they are only entitled to receive the sum of Fifteen Hundred Dollars

($1,500.00). They are further informed that, if a substitute employee does not accept the $1,500.00 payment within a thirty (30) day period, he will receive nothing. Petitioner continues to appear at the Respondent's place of business to inquire about employment and is informed that none is available by both the Respondent and his unions.

On August 22, 1978 a letter is sent to the Petitioner from the company, signed by Mr. Paul C. Bowen, informing Petitioner that an enclosed check in the amount of Two Hundred and Forty-Six Dollars and Seven Cents ($246.07) represented back pay in full accordance with the Myron L. Joseph arbitration award. The money paid was only for the period until the collective bargaining agreement expired, from December 5, 1976 to December 31, 1976. This letter purports by its terms to be the result of a joint review of the records by both the

company and the union. (Appendix page 187a)

On August 30, 1978, Petitioner, after completing a union grievance procedure which required over a year and a half to complete, complained to E.E.O.C. in regard to alleged discriminatory practices by his unions and their officers. The Respondent was not named. He did not know that he would effectively waive all Title VII claims against Abell if he did not specifically name it in his charge. Abell had not posted required notices which would have directed Petitioner to agencies which would have informed him of his rights under Federal law.

On January 4, 1980, after receiving a "right to sue" letter from E.E.O.C., Petitioner files the instant suit, pro se, against his unions. The Respondent was not listed as a defendant.

On January 20, 1983, Petitioner's Second Amended Complaint was filed with assistance of counsel, in which the

Respondent was included as a defendant. Among the claims listed against the Respondent are claims for violations of Title VII, conspiracy, failure to post required information about provisions of the Civil Rights Act (Appendix page 175a), and violations of contract and a quasi-contract.

On November 6, 1983, Respondent's Motion to Dismiss is granted as to all of Petitioner's federal claims against it. A determination is made that the quasi-contract claim brought by Petitioner is a state contract claim. No discovery is obtained from Respondent before the Court rules. The decision is based on grounds of limitations and lack of federal jurisdiction.

On November 16, 1983, discovery of documents from the union files is begun by Petitioner as the court orders that he have access to such documents. As review of union documents progresses, documents are

discovered which indicate that there was a dispute between the local union and Abell regarding Abell's compliance with the arbitration award and that the matter had been taken to the N.L.R.B.

In April of 1984 a copy of the transcript of the arbitration proceeding was obtained by Petitioner from the N.L.R.B. (Appendix page 189a) Information therein included the terms of the agreements between Abell and the union, details of an expansion of the issues to be arbitrated, and details of the decision and their basis. (Appendix page 186a)

Petitioner also discovers that the union, after the N.L.R.B. dismissed its charge, filed an action in the Federal District Court (N-78-455) about the enforcement of the arbitration award which it later voluntarily dismissed. From reading the documents from the union and Abell to the N.L.R.B. and the District Court, Petitioner discovered that Abell and

the union, during the arbitration hearing, agreed to arbitrate all issues regarding the hiring of substitute employees and that they agreed that they would abide by the arbitrator's determination without regard to the expired status of the collective bargaining agreement.

Petitioner also discovered at that time that Abell was extremely displeased with the holding of the arbitrator and was resisting payment and action required by the holding.

On May 14, 1984 Petitioner filed two (2) suits in the Maryland State Court on behalf of himself and all other substitutes affected by the arbitration: (1) A case to affirm the arbitrator's award, naming Abell as defendant; and (2) a second case against Abell, the unions, and several company and union officers for damages resulting from non-payment of the full amount due to the substitutes as a result of the award. In the suit to affirm the award, Mr. Rajaram,

on behalf of himself and the others requested that an auditor be appointed to assist in establishing the exact amount due as full payment as a result of the award.

On June 15, 1984 the Maryland State lawsuit (suit mentioned as number 2 above), against Abell, the unions and company and union officers for damages resulting from non-payment of the full amount due to the substitutes as a result of the award, is removed by the defending parties to the federal district court.

In August of 1984 Mr. Rajaram, on behalf of substitute class, submits Interrogatories to a defendant, company official, John Banach. Abell's counsel answers by filing for a Protective Order. Petitioner herein, on behalf of class, replied and urgently requested that this determination (regarding discovery matters) be made before any determinations or hearing on other pending Motions was scheduled.

On October 12, 1984 Petitioner filed a Motion for Revision of Interlocutory Order of Court requesting that Abell be brought back in as a defendant in the instant case. The Motion was based on new evidence of joint misrepresentation and concealment by Petitioner's unions and Abell and stated details about his diligence including his counsels' search for information, how he was not aware of his entitlement prior to his discovery and specified that all he was told he was entitled to earlier was the mentioned $1,500.00 payment. He stated therein that he was informed by both his union and Abell that work opportunities were not available. Within the Motion, Petitioner states how evidence about the extent of the arbitration award and agreements therein, revealed in the transcript, was not revealed or published by either his unions or Abell. He noted that he was not able to state the exact amount to which he was entitled. Even

though the arbitrator's decision had indicated that the substitute employees were to be put back to work after the expiration of the collective bargaining agreement, only Abell could supply the details relating to absences of its full-time regular employees.

Within the Maryland State Court, with regard to the case that was not removed to Federal Court, an affidavit dated October 15, 1984 from John Banach was submitted by the Respondent. (Appendix page 123a)

On October 19, 1984 a scheduling conference is held with Judge Black in the District Court in which all matters pertaining to the both the removed case and the instant case were simultaneously referred by the judge to Magistrate Smalkin without Petitioner agreeing to such referral. Counsel for Petitioner requested, at that conference, that a ruling on discovery motions, which would be relevant to similar claims and defenses in

both pending cases, be given prior to any other hearings or determinations on any other pending matters.

October 26, 1984 Abell submits its Answer to Petitioner's Motion for Revision of Interlocutory Order of Court, wherein Respondent requests a hearing. No specific information other than conclusions is provided by Respondent to show how the new evidence was available prior to the time indicated by Petitioner.

On December 14, 1984, Magistrate Smalkin submited his Report and Recommendation to the District Court, without having held the requested hearing.

On February 8, 1985, a "de novo" hearing is held in the District Court on Petitioner's Exceptions and Objections to the Magistrate's Report and the court ruled that the Report and Recommendation of the Magistrate be adopted in its entirety. The District Court Judge stated that his decision was based on the Motion for

Revision being insufficient to comply with requirements to state specific facts about fraudulent concealment and misrepresentation to toll the statute of limitations as specified to be necessary in prior court holdings. The Court refuses a request to allow an amendment. The District Court also found that it was proper to enter final judgment under F.R.Civ. P., Rule 54(b). The District Court does not use its equity power.

On March 6, 1985, notice of appeal from the District Court decision was filed.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court determination on January 9, 1986. The Court of Appeals concluded that while the District Court Judge had stated that his decision was based on the wording of the Motion to Revise, that in its view the decision was on the merits. It found that insufficient evidence of fraudulent intent had been presented. The Court of Appeals

concluded that the certification under Rule 54(b) was proper as "... one of the first dispositive developments in this protracted litigation". The Appellate Court said that the District Court finding of no just reason for delay was also proper.

The United States Court of Appeals for the Fourth Circuit denied Petitioner's Motion for Rehearing on February 25, 1986. (Appendix page 109a)

BASIS OF ORIGINAL FEDERAL JURISDICTION

This case was first presented to the District Court based on 28 U.S.C. 1331; and 28 U.S.C. 1343; and statutes 29 U.S.C. 185; 42 U.S.C. 1981; 42 U.S.C. 1994; 42 U.S.C. 1985; 42 U.S.C. 1986; 42 U.S.C. 2000e; 42 U.S.C. 2000e-2(a); 42 U.S.C. 2000e-5; and 42 U.S.C. 2000e-10.

REASONS FOR ALLOWANCE OF THE WRIT:

This court should provide fresh guidelines on the proper exercise by the district courts of Federal Rules of Civil Procedure, Rule 54(b): The District Court for the District of Maryland decided (Appendix page 85a), and the United States Court of Appeals for the Fourth Circuit affirmed (Appendix page 1a, and page 109a), that it is a proper exercise of discretion to direct the entry of final judgment under Fed. R. Civ. P. 54(b) (Appendix page 182a) in a case under the following circumstances presented within the instant case: (a) The court was aware of facts and circumstances of another case pending before it (Case No. B-84-2465) (Appendix page 191a, and page 44a) which included both the Petitioner and the Respondent and which, recently was found to be precluded by the issues, claims and questions presented in the instant case; (b) the 54(b) entry was granted following

a determination against an attempt to revise an interlocutory order based on new evidence, because of a fear of a dismissed party that it could be inconvenienced by being required to further defend against other motions to revise; (c) there was no issue addressed therein which could not be effectively reviewed on appeal from final judgment; (d) an alleged co-conspirator in alleged acts of fraud, fraudulent concealment and conspiracy remains in this case as a defending party and there was no discovery from the party being dismissed with finality; and, (e) the 54(b) certification was granted for the reason that the dismissal of a party "was one of the first dispositive developments" in the case.

This Court is respectfully asked to provide more specific directions about a loose interpretation of the requirements for the issuance of a certificate under Rule 54(b) as represented herein and

which is in conflict with prior holdings of various appellate courts.

Judge Black, in the District Court, held that he was not violating "the policy against piecemeal litigation..." by the Petitioner and Respondent, of similar issues, claims or questions presented in another case pending before him "... because that policy extends to parties in the same case, not a different case". (See, Opinion of Judge Black, Appendix at pages 83-84a.) The Rule does not directly address the application of this policy when there are more than one case involved and the appellate court did not express its opinion thereon.

The stated principle underlying Rule 54(b) is that certification is available to grant "a discretionary power to afford a remedy in the infrequent harsh case." This principle is set out in the Notes of the Advisory Committee on Rules

concerning 1946 amendments. See, e.g., Jasmin v.Dumas, 726 F.2d 242 (5th Cir. 1984).

The District Court intoned the words that there was no just reason for delay. That statement did not consider the effect of the other case which was then pending before it. It also did not properly address concerns that it could be creating law of the case through its rulings which affect the claims against an alleged co-conspirator on claims yet to be litigated. The appellate court also did not consider that danger and may have in error and inadvertently considered elements of the arbitration claim that had not been ruled on by the District Court at the time of the appellate decision. Since other claims include fraud, unjust enrichment, breach of contract, and violations of LMRDA, and evidence about the conspiratorial relationship between the

Respondent and the unions will necessarily be elicited as the case proceeds, another reason for delay exists. See, Robbin v. American University, 330 F. 2d 225 (D.C. Cir. 1964); and Hayden v. McDonald, 719 F.2d 266 (8th Cir. 1983).

Some of the appellate courts have been interpreting this as a strict requirement and keep a tight rein on parties requesting such certification. The burden is placed on the requesting party to show that it would be under great hardship by denial of 54(b) certification. Rudd Const. Equip. Co., Inc. v. Home Ins. Co., 711 F.2d 54 (6th Cir. 1983); Panichella v. Pennsylvania Railroad Company, 252 F.2d 452 (3d Cir. 1958); and, the 7th Circuit, which expresses the opinion that the decisions in Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956); and, Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956) may be ripe for re-examination, in

Minority Pol. Off. Ass'n v. City of South Bend, Ind., 721 F.2d 197, 201 (7th Cir. 1983).

In affirming the decision of the District Court in the instant case, the Fourth Circuit adopts a lower standard of interpretation and would subject a non-moving party to the burden of submitting proof against a contention that "there is no just reason for delay." Citing its own holding, Para-Chem Southern, Inc. v. M. Lowenstein Corp., 715 F.2d 128 (4th Cir. 1983).

The District Court's later ruling in the forementioned case number B-84-2465 (Appendix page 62a, page 88a, and page 105a) (including a finding of res judicata, based on its ruling in the instant case) is now in the process of being appealed. See, Appendix at page 105a, page 150a. This underscores the reasoning of the courts which consistently have strived to relieve

the burdens of multiple appeals. This Court is requested to grant this petition and determine that there should be no differentiation as to whether there is a question of one case or more, where the courts are aware that successive appeals will be taken against the same Respondent and will bring up similar underlying facts.

This Court should allow this writ and provide clear directions and guidelines on the proper application of the statutes of limitations. Clarification of standards is needed in regard to lawsuits which fall within the field of labor-management relations wherein may be claims for violations of the Taft-Hartley Act and claims of discrimination, allegations of fraud and/or fraudulent concealment, and conspiracy to deprive union members of their right to fair representation. (Appendix page 151a, page 153a, page 161a, page 165a, page 166a, page 155a, and page 159a.)

In this case, the courts below erroneously determined that the plaintiff was on notice of his claim and limitations began to run against him when he was terminated from employment with Abell.

The courts below erroneously determined that the plaintiff is imputed with the knowledge of his union (an alleged co-conspirator), that he was on notice of his claim and limitations began to run against him when statements were made by Abell to his union, even though the record indicates that Abell's statements were not disclosed.

The courts below failed to recognize a letter from Abell to its employees, which falsely represented the relief due, as an affirmative act of fraudulent concealment which would mislead a plaintiff into repose. (See, Appendix 187a.)

Petitioner believes that he stated facts, such as non-publication of the extent

of his entitlement and lack of knowledge of critical facts (including the fact that he was entitled to further employment and compensation past the expiration of a collective bargaining agreement), to meet the allegation requirements of the doctrine of fraudulent concealment stated in Chevalier v. Baird Savings Association, 371 F. Supp. 1282 (E. D. Pa. 1974), but believes that the concept requires elucidation. The appellate court erroneously determined that the Petitioner was on notice of his claim, limitations began to run against him and he (and thereby each employee) is required to launch an immediate independent investigation whenever dissatisfied or suspicious. The appellate court erroneously determined that, when plaintiff felt that he was paid an insufficient amount stated (by Abell) to be in "full compliance" with an arbitrator's award pursuant to an agreement between his union and Abell, the limitations

clock begins to run.

Limitations usually begin to accrue when operative facts are known as stated in Lewis v. Clark, 534 F. Supp. 714 (D. Md. 1982). However, as the Maryland State Court stated in O'Hara v. Kovens, 305 Md. 280 (1986), the circumstances may be such that one would not be on notice. The treatment by the District and Appellate Courts of these matters in the instant case demonstrate the need to define the degree of knowledge required to have limitations begin to accrue. The extent of an agreement that was agreed to in secret and not disclosed to a union member is imputed from a general dissatisfaction which most union members have with most union agreements. An employer stating a half truth in an effort to not disclose, in agreement with a union in breach of its responsibilities, is then insulated from any responsibility even though the operative knowledge to

realize the falsity of the half truth is not public. (See, Appendix page 187a.)

Further, will this Court sanction as policy the allowance by lower courts of a procedure allowing a defendant to avoid all discovery while concurrently placing the full burden on plaintiff to state knowledge that was kept secret. The District Court ruled on Motions to Dismiss prior to allowing any requested discovery, and the appeals court did not address that matter. It is requested that the petition be granted and policy be set that where the allegations of a plaintiff are focused on a particular matter that a court not give the equivalent of summary judgment (Appendix page 183a) prior to allowing reasonable discovery. In the instant case where facts are arguably in dispute, the distrct court by merely reciting an unduly harsh standard of specificity did not allow any discovery. Both the District Court and appellate court

relied on Davis v. Edgemere Finance Co., 523 F. Supp. 1121 (D. Md. 1981) which relied on some language within Stearns v. Page, 48 U.S. (7 How.) 819, 829 (1849). (Appendix page 47a, page 77a, page 1a). Both lower courts are not giving equal weight to other principles noted within Stearns at page 823, as to when the limitations do not begin to run, considerations to apply when evidence is based on books which do away with the lapse of time, and equitable circumstances. The petition should be granted to clarify for courts who have the burden of going forward for each party when a plaintiff alleges fraudulent concealment, and the degree of specificity in either a Motion or Complaint that would suffice to allow a case to proceed. Petitioner notes that different standards are apparently employed for review by the courts if fraudulent concealment is alleged by way of motion than if the fraudulent concealment

allegation is in a pleading. See, Butcher v. Robertshaw Controls Co., 550 F. Supp. 692, 701-03 (D. Md. 1981); and, Copiers Typewriters Calculators, Inc. v. Toshiba Corporation et al., 576 F. Supp. 312 (D. Md. 1983), for standard when fraud is in a pleading. (Appendix page 176a, and page 182a)

In the instant case, Petitioner alleges and it is not disputed, that Abell failed to post the statutorily required notices informing its employees of their rights under certain federal laws. Court determinations on this issue are extremely sparse. The district court erred when it did not consider this claim as being applicable to a tolling or estoppel of the statute of limitations or applicable to excuse the requirement that a plaintiff specifically name his employer in an Equal Employment Opportunity Commission charge prior to coming to court with a Title VII

claim. The district court further held that violation of the posting statute(s) does not provide a basis for a private cause of action upon which relief may be granted; the sole recourse against a violating party is via the nominal fine as specified.

The district court had no prior holdings to provide direction or guidance regarding this issue. It could only rely on Court v. Ash, 422 U.S. 66 (1975) in effort to analyze the availability of relief. (Appendix page 21a) This Court should grant this petition and provide clear directions and guidelines on the relief to be allowed and avenues of redress legally available to a party who is injured through violations of posting statutes.

This Court should grant this petition and provide clear directions and guidelines on requirements to avoid waiver of appellate review from a district court's adoption of a magistrate's recommendation.

The instant case was assigned to a magistrate for the handling of preliminary procedures without the consent of the plaintiff (your Petitioner) (Appendix page 18a). The complaint contained allegations against Petitioner's employer, his unions and several individuals. There were several claims including those of discrimination and violations of labor laws. At the first hearing and prior to any discovery from any party, the magistrate recommended that all claims against Abell be dismissed due to the sparsity of proof of claims against it. (Appendix page 21a) It was after the allowed time to take exceptions to the magistrate's report had passed before discovery of documents from the unions (Appendix page 111a, page 186a, and page 189a) provided a path by which the plaintiff searched and found evidence which would substantiate claims against Abell. The appellate court ruled that your Petitioner, by failing to

file timely objections to the magistrate's report, failed to present matters to the district court judge and thereby waived appellate review of issues determined therein.

Petitioner did not file objections (Appendix page 42a) to the initial recommendations of the magistrate in the instant case with the understanding that it would lead to an interlocutory ruling by the district judge and that the district court had the discretion to revise those rulings at any time prior to the entry of final judgment in the case. Simmons Co. v. Grier Bros. Co., 258 U.S. 82 (1922). Further, the magistrate's determination indicated, and Petitioner believed, that he needed some discovery of materials which were in the hands of the defendants to provide additional proof of his contentions against Abell prior to submitting more allegations to the court. Adopting the

reasoning of the lower courts would mean that a party is required to paper the District Court, after a determination by a magistrate, with objections even if he knows he has insufficient proof merely to preserve his objection.

This Court should grant this petition and provide clear directions and guidelines on whether circumstances as described herein meet requirements to avoid waiver of appellate review from a district court's interlocutory determinations resulting from adoption of a magistrate's recommendation.

This Court should grant this petition and provide clear directions and guidelines on whether circumstances, evidence and pleading as described herein meet requirements to allow a case for fraud and/or fraudulent concealment to go to trial.

Petitioner presented to the District

Court evidence, as more specifically set out in the statement of the case, that: Abell made agreements with Petitioner's union which would benefit him; Abell later refused to "live with" those agreements (see Appendix page 123a); his union was informed of Abell's refusals; both Abell and the union participated in an affirmative act designed to mislead Petitioner and others in regard to their rightful benefits and never informed Petitioner and others that those benefits extended beyond the expiration of a collective bargaining agreement. (See Appendix page 186a.)

Without considering all of the evidence submitted, the district court determined that the wording of the plaintiff's motion was not sufficient to meet the technical requirements of stating fraud or fraudulent concealment, relying on Davis v. Edgemere Finance Co., 523 F. Supp. 1121 (D. Md. 1981); Stearns v. Page,

48 U.S. (7 How.) 819, 829 (1849); and, Chevalier v. Baird Savings Association, 371 F. Supp. 1282 (E. D. Pa. 1974).

In addressing this issue, the appellate court stated it considered Petitioner's contentions on the merits and found that Abell had no duty to disclose, that Petitioner's "being suspicious" meant that he knew he had not received what he was entitled to and a search should have allowed him to discover his entitlement earlier. Yet, since the Appellate Court does not reconcile that suspicion with information supplied by Respondent Abell to Petitioner in conjunction with Petitioner's union about full compliance (Appendix page 187a), and that the critical information about the extent of the Petitioner's entitlement was not public (Appendix Motion at page 112a) should allow equitable tolling and mean that an intent

to defraud was present and demonstrated by Petitioner.

Thus, the Appellate court purports to speak as if it had considered the merits of the entire case, but actually only dealt with staying limitations.

Petitioner's delay in bringing a claim against Abell to the court is directly attributable to acts of Respondent through its use of fraudulent misrepresentations regarding facts of the details of its agreement with the union. If the rulings in this case are permitted to stand, allowing Abell the benefit of a defense of the statute of limitations, its reward will be greater yet. The court below should be directed to not permit accrual of benefit as a reward for such conduct.

Under the circumstances in cases such as the one herein, this Court should instruct the courts to utilize their equitable powers when the facts and

circumstances indicate that such would be prudent to prevent an injustice. (Appendix 179a, and page 181a) A Maryland case, Farmer v. O'Carroll, 162 Md. 431 (1932), describes the nature of constructive fraud which comes under the guiding principle of equity where persons stand in confidential relation towards each other. That court determined that vigilance, not exercised because of trust and confidence reposed in a party, could not assure benefit to the deceitful party. Williston on Contracts, sec. 1516, states that one should not be assured of the benefit of a deceit made possible by the defrauded party's genuine belief, although founded in stupidity or credulity. See also Gross v. Stone, 173 Md. 653. (1938), wherein it is stated, at 666:

> "A court of equity will not permit one party to take advantage of and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct."

This Court should grant this petition and clearly state that an employer stands in a confidential relationship with its employees (particularly when it communicates directly with them) and must accept the responsibilities incurred thereby.

In the instant case, the Respondent: (1) Falsely and wrongfully represented to Petitioner that he had no right to available work opportunities, in controvention of both a quasi-contract and at a time after a right to continued employment existed from an arbitrator's decision that stated that Respondent was directed to hire the subsdtitutes; (2) falsely and wrongfully represented to Petitioner that he had to accept the offered $1,500.00 (contained within a collective bargaining agreement) within a 30 day period or walk away with nothing; (3) falsely and wrongfully represented to Petitioner that a subsequent

check in the amount of $246.07 was full payment in compliance with the award of arbitrator Myron L. Joseph, as determined by a joint review of the records with the union (See Appendix page 187a); (4) misrepresented critical details of the award to a subordinate employee who would, and did, rely on authoritative statements; (5) caused Petitioner to be exposed to a defense of the statute of limitations thereby; (6) caused Petitioner to be exposed to defenses of the statute of limitations and failure to name Respondent in an E.E.O.C. charge by failure to comply with federal law requiring the posting of notice of employee's rights (Appendix page 175a); and (7) caused further exposure to Petitioner to defenses of the statute of limitations by adopting portions of illegal exhaustion requirements of a union by-law into its collective bargaining agreement (Appendix page 126a).

The foregoing have caused Petitioner to suffer substantial losses and damages as the direct result of violations of his rights and being denied compensation which has been due and owing.

Petitioner respectfully requests the Court to grant this petition and rule on the issues presented in it in accordance with the statement in Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231:

> "No man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

A review of holdings in this case, from the certification of final judgment in the district court, stating that Petitioner's claims are barred by a technical failure in wording, back through the interlocutory order that

other claims by Petitioner are barred because some Defendants were not named in the correct spaces of an E.E.O.C. complaint form, shows that the district court takes the position that a party should be held to strict, literal procedural technicalities in the initiation and pursuit of a claim. This Court should direct that the character of a case such as this, which was initially filed pro se by your Petitioner (B-80-0012 paper 1 and Appendix page 127a), requires that a more liberal interpretation of technical requisites be employed. This request is based on the holdings in, Love v. Pullman Co., 404 U.S. 522 (1972). Since that decision, the courts have properly been trending toward equitable acceptance of more liberal applications of terminology. See also, Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (1981) and cases cited therein. Cf. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

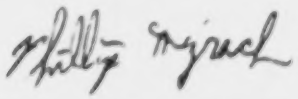
Moreover, the documents submitted in the instant case, show how the acts of the Respondent, through fraud, misrepresentation and concealment, prevented Petitioner from earlier coming to the Court with a clear statement of his claim.

Respondent has been unjustly enriched by having the ability to utilize new technology without paying for its use of Petitioner's services under the quasi-contractual relationship that existed between them. That injustice has never been properly addressed by the courts below and a reversal to allow equitable relief is warranted.

CONCLUSION

For the reasons discussed above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



Phillip Mizrach
1746 Eastern Avenue
Baltimore, Maryland 21231
Telephone (301) 563-0990

Dated this 27th day of May, 1986.

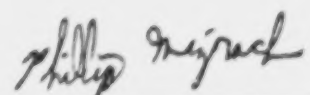
CERTIFICATE OF SERVICE

I, Phillip Mizrach, attorney for petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify:

(1) that there is only one party required to be served with three copies of the foregoing Petition for a Writ, i.e., (Respondent) A. S. Abell Publishing Company, 501 North Calvert Street, Baltimore, Maryland 21202

(2) that the Respondent's attorney of record who represented the Respondent in courts below was Jeffrey Peabody Ayres, Esq., and his address of record was Venable, Baetjer & Howard, 1800 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and

(3) that on this 27th day of May, 1986 (the day of filing), I mailed three identical copies of the foregoing Petition for a Writ addressed to the attorney mentioned in section (2) above, addressed to his Post Office address of record recited in section (2) above, first-class mail postage prepaid, by depositing the same in a U.S. Post Office.



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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1268

Kondian R. Rajaram, Appellant,

versus

A.S. Abell Publishing Company, Appellee,

and

International Typographical Union; Baltimore Typographical Union No. 12; Sunpapers Chapel of Baltimore Typographical Union No. 12; Jack Poist; Gary Kidwell, Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge. (C/A No. 80-12)

Submitted: December 12, 1985

Decided: January 9, 1986

Before RUSSELL and SNEEDEN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

(Kondian R. Rajaram, Appellant Pro Se. Jeffrey P. Ayres, Venable, Baetjer and Howard, for Appellee.)

PER CURIAM:

Kondian R. Rajaram appeals the denial by the district court of his motion for revision of an interlocutory order under Fed. R. Civ. P. 54(b), and the subsequent entry under Rule 54(b) of a final judgment dismissing A.S. Abell Publishing Company (Abell) as a defendant in Rajaram's suit.

I

In his motion for revision, Rajaram attempted to resurrect claims against Abell under 42 U.S.C. §§1985, 1986; Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185; and under state contract law. Rajaram stopped working for Abell in 1978. Although Rajaram originally filed suit against his union in 1980, he did not name Abell as a defendant until he filed his second amended

complaint in 1983. On October 20, 1983, the magistrate recommended dismissal of the civil rights and § 301 breach of contract claims as barred by the applicable statutes of limitations.1/

> 1/ The statute of limitations for actions under 42 U.S.C. § 1985 is three years, with the cause of action accruing when the plaintiff knows or has reason to know of his injury. Lewis v. Clark, 534 F. Supp. 714, 716 (D. Md. 1982). The limitations period for actions under § 1986, as stated in the statute itself, is one year. The claim under the Taft-Hartley Act was subject to a six-month limitations period. Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983); see also Del Costello v. Local 1557, International Brotherhood of Teamsters, 762 F.2d 1219, 1221 (4th Cir. 1985) (applying Del Costello retroactively); Murray v. Branch Motor Espress Co., 723 F.2d 1146, 1148 (4th Cir. 1983) cert. denied, ___ U.S. ___, 53 U.S.L.W. 3289 (Oct. 15, 1984) (same).

The magistrate rejected Rajaram's claim that he was entitled to a tolling of the statute of limitations under the doctrine of fraudulent concealment. See Davis v.

Edgemere Finance Co., 523 F. Supp. 1121, 1125 (D. Md. 1981). In light of the insubstantial nature of Rajaram's federal claims, the magistrate further recommended the district court decline jurisdiction over the state law contract claims against Abell. In the absence of objections from either party, the district court adopted the report and recommendation of the magistrate in its entirety, and on November 10, 1983, entered an order dismissing Abell as a defendant in the suit.

On October 12, 1984, Rajaram moved the district court to revise its interlocutory order dismissing Abell from the suit. In his motion for revision, Rajaram claimed that new evidence had been discovered that demonstrated misrepresentation and fraudulent concealment by Abell, with respect to a 1977 arbitration award. According to Rajaram, the newly-discovered

evidence entitled him to a tolling of the limitations periods on his claims until after such evidence was discovered. Abell opposed the motion as untimely and on the grounds that Rajaram's allegations of fraud were speculative. Abell further requested the court to certify the order of Abell's dismissal under Fed. R. Civ. P. 54(b), direct entry of judgment in favor of Abell, and award costs under Fed. R. Civ. P. 54(d).

The magistrate found Rajaram's claims that Abell maliciously, intentionally, and in conspiracy with the union concealed from him certain facts regarding the 1977 arbitration award to be conclusory in nature and unsupported by specific facts. Because he regarded Rajaram's claim of fraudulent concealment as insufficient to require reinstatement of his three earlier claims, the magistrate recommended denial of the motion for revision and the entry of a final

judgment dismissing Abell from the suit.

After a hearing on Rajaram's objections to the magistrate's recommendation, the district court adopted the report in its entirety. Rajaram now appeals from the order of the district court entering final judgment for Abell under Fed. R. Civ. P. 54(b).

II

On appeal Rajaram challenges the propriety of the district court's entry of final judgment under Fed. R. Civ. P. 54(b). That rule

> permits a district court to enter final judgment as to one or more but fewer than all claims in a multi-claim action when there is "more than one claim" for relief presented in the action, and there "is no just reason for delay."

para-Chem Southern, Inc. v. M. Lowenstein Corp., 715 F.2d 128, 131 (4th Cir. 1983). The issuance of a certificate by the district court under Rule 54(b) is not

conclusive as to the finality of the court's order. Page v. Preiser, 585 F.2d 336, 338 (8th Cir. 1978). Here, however, we are satisfied that the district court properly directed the entry of a final judgment disposing of all claims by Rajaram against Abell. In this suit, Rajaram brought multiple claims against his local and international unions and against individual union officials, as well as against Abell. As the magistrate noted, the dismissal of Abell as a defendant was one of the first dispositive developments in this protracted litigation. The district court decision was an ultimate disposition of several cognizable claims for relief entered in the course of a multiple action claim, see J. Aron and Co. v. Service Transportation Co., 515 F. Supp. 428, 432 (D. Md. 1981), and therefore the proper subject of an entry of judgment under Rule 54(b). The district

court's further determination that there was "no just reason for delay" was also a proper exercise of discretion under all the circumstances of this case. See Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 8 (1980); Para-Chem Southern, Inc., 715 F.2d at 132. We therefore find it proper to consider the merits of this appeal.

III

We conclude that Rajaram's appeal fails utterly on the merits. There is no dispute between the parties as to the showing Rajaram must make in order to achieve an equitable tolling of a limitations period under Davis. To avoid the statute of limitations under a doctrine of fraudulent concealment, a plaintiff

> "must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment, -- must specify how, when, and in what manner it was perpetrated. The charges must be definite and

> reasonably certain, capable of proof, and clearly proved. . . . And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made."

Davis, 523 F. Supp. at 1126 (quoting Stearns v. Page, 48 U.S. (7 How.) 819, 829 (1849)).

During a hearing before the district court judge on his objections to the magistrate's recommendation, Rajaram submitted two documents which purportedly supported his theory of fraud. The first document was a letter from Abell dated August 22, 1978, informing Rajaram that, pursuant to the 1977 arbitration award, the employer and union determined that Rajaram was entitled to the sum of $246.07. In November 1983, while continuing to pursue discovery on his remaining claims against the union, Rajaram learned of a dispute

between the union and the company regarding compliance with the arbitration award, and that the union had filed a complaint with the National Labor Relations Board (NLRB). The second document offered by Rajaram was a March 23, 1984, letter to him from the NLRB regarding his request under the Freedom of Information Act for the transcript of the arbitration proceeding, which Rajaram ultimately received in April 1984. Rajaram claims the arbitration decision entitled him to reinstatement and additional money. He therefore argues that the August 22, 1978, letter was a deliberate act of concealment or misrepresentation on the part of Abell.

Rajaram has made a number of broad and vague assertions of conspiracy between Abell and the union. However, merely intoning the word fraudulent is not sufficient to raise the defense. Weinberger

v. Retail Credit Co., 498 F.2d 552, 555 (4th Cir. 1974). Rajaram has failed to demonstrate any particular act of fraudulent conspiracy which would permit him to avoid the statute. The mere nondisclosure by Abell in its August 1978 letter of its dispute with the union over the arbitration award 2/

> 2/ Indeed, the record indicates the company has consistently made known its dissatisfaction with the arbitration award. In an affidavit dated October 15, 1984, John J. Banach, Jr., Vice President of Industrial Relations for Abell, stated that upon receipt of the 1977 arbitration decision, he informed the union during its current negotiations that the company "could not live with the terms of the awarad and would insist on changing the old collective bargaining agreement in order to deal with the issue of substitutes." After the award, the newspaper refused to reinstate the temporary situations. Despite grievances and a charge filed with the NLRB, the union could not enforce compliance with the arbitration award; the Board refused to issue a complaint and dismissed the charge.

does not constitute an affirmative act of

fraudulent concealment which frustratred Rajaram's ability to learn of the factual bases for any of Rajaram's multiple claims against Abell. Nor has Rajaram presented any evidence that fraudulent intention on the part of the company prevented any further disclosure to Rajaram. See Chevalier v. Baird Savings Association, 371 F. Supp. 1282, 1285 (E.D. Pa. 1974) (suggesting possible application of fraudulent concealment doctrine under these circumstances. 3/

3/ On appeal Rajaram also objects to the district court's refusal to examine additional documents submitted a few days prior to the hearing. The materials included the transcript of the 1977 arbitration proceeding, a newspaper article concerning the arbitration award, copies of the union contracts, and answers to interrogatories posed to the union defendants. In making a de novo determination, a district court may receive evidence in addition to that before the magistrate. 28 U.S.C. § 636(b)(1). See also United States v. Frans, 697 F.2d 188, 191 n.3 (7th Cir.), cert.

denied, 464 U.S. 828 (1983). However, our review of this material discloses that it adds little of significance to support Rajaram's theory of fraudulent concealment. Therefore, the court's refusal to consider the additional submissions did not prejudice Rajaram.

Even if the August 1978 letter were so construed, the record amply supports the district court conclusion that, by exercising ordinary diligence, Rajaram could have obtained the necessary information about the arbitration proceeding well before November 1983. During the hearing before the district court, Rajaram acknowledged that he knew of the existence of an arbitration award in 1977, and also admitted to being suspicious that he had not received everything to which the arbitration award entitled him. In his motion to revise the interlocutory order, Rajaram stated that the union informed him after the arbitration

hearing that the award should cost the company a substantial amount of money. Yet, despite his suspicions, Rajaram failed to focus his discovery efforts on the arbitration proceeding until he happened to obtain additional information about the award in November 1983. Abell had no duty to disclose the terms of the arbitration award to Rajaram, and the record indicates he had sufficient notice of the award in 1978 to require him to make further inquiry as to its terms. 4/

4/ Rajaram also objects to not being permitted to amend his motion to revise. Although portions of the district court's ruling were couched in terms of a deficiency in Rajaram's pleadings, the ruling was clearly a decision on the merits of Rajaram's claim of fraudulent concealment. It is unclear what Rajaram hopes to accomplish by amendment. During an October 12, 1983, hearing before the magistrate on Abell's earlier motion to dismiss, and during the subsequent hearing before the district court on Rajaram's motion to revise the interlocutory order, Rajaram had ample opportunity to plead and

prove his theory of fraudulent concealment. Considering the lateness of the motion, and other circumstances of the case, the district court judge did not abuse his discretion in denying the motion to amend. See Page v. Bolger, 645 F.2d 227, 228 n.1 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981); see also Girard Trust Bank v. Martin, 557 F.2d 386, 390-91 n.3 (3d Cir.), cert. denied, 434 U.S. 985 (1977) (denial of motion to amend petition which sought to open or vacate judgment on grounds of fraud proper when probing at oral argument failed to reveal presence of any fraud).

For the foregoing reasons, we affirm the order of the district court entering final judgment for A.S. Abell Publishing Company on Rajaram's claims. 5/

5/ In his informal brief, Rajaram also cites as error the district court's ruling that he had no private right of action under 42 U.S.C. § 2000e-10 for Abell's alleged failure to post a proper notice of an employee's rights. Abell argues that Rajaram waived appellate review of this claim by his failure to object to the magistrate's recommendation to dismiss this claim. See United States v. Schronce, 727 F.2d 91, 94 (4th Cir.), cert. denied, ___ U.S. ___, 52 U.S.L.W. 3844 (May 21,

1984). Rajaram contends there was no waiver of appellate review because the district court's subsequent entry of judgment was interlocutory, and the district court retained discretion to revise the order at any time prior to the entry of final judgment. See Fed. R. Civ. P. 54(b).

The magistrate's report concluded with a recommendation that, "upon the expiry of time allowed in Local Rule 82 and Fed. R. Civ. P. 72 for taking exception hereto, an order be entered granting defendant Abell's motion to dismiss." Although this language is perhaps not as clearly mandatory as that in Schronce, 747 F.2d at 94, in view of Rajaram's representation by counsel below, we would construe the magistrate's directive as sufficient to alert Rajaram to his procedural obligations. The fact that the district court's entry of judgment was interlocutory did not relieve Rajaram of his obligation to file objections to the magistrate's recommendation. Although the district court's order was subject to further revision, Rajaram failed to raise the claim in his motion to revise the interlocutory order; nor did he raise the matter at any time in the district court after Abell moved the court to direct the entry of judgment under Rule 54(b). Absent exceptional circumstances, questions not raised and properly preserved in the district court

> will not be considered on appeal. United States v. One 1971 Mercedes-Benz, 542 F.2d 912, 915 (4th Cir. 1976). Under the circumstances, we regard the issue as waived.

Although meritless, we do not regard the appeal as frivolous. We therefore deny Abell's request for double costs and attorney's fees. See Harman v. Pauley, 678 F.2d 479, 482 (4th Cir. 1982). As the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM

vs.

INTERNATIONAL TYPOGRAPHICAL UNION, ET AL.

CIVIL ACTION NO. B 80-0012

ORDER OF REFERENCE
TO UNITED STATES MAGISTRATE

In accordance with Local Rule 80 of the United States District Court for the District of Maryland, this case is hereby referred to the Honorable FREDERIC N. SMALKIN, United States Magistrate for the said District, for the following purpose(s);

* _____ Trial

* _____ Service as Special Master in other than complex cases (see Rule 53(b), F. R.

Civ. P. and 28 U.S.C. §636(b)(2).

_____ Service as Special Master in a complex case.

_____ Processing and disposition in accordance with Rules Governing Cases under 28 U.S.C. §2254 and §2255.

_____ Processing and disposition as a complaint challenging conditions of confinement filed under 42 U.S.C. §1983.

XX Hearing and determination of non-dispositive pre-trial matters as follows: (All);

XX Hearing, proposing findings of fact, and making recommendations as to dispositive pre-trial matters as follows: (All);

_____ Ordering and conducting supplementary proceedings in accordance with Maryland Rule of Procedure 628.

_____ Specially appointing process servers pursuant to Rule 4(c), F. R. Civ. P.

_____ Reviewing administrative determinations (pursuant to 42 U.S.C. §405(g) as to Social Security or related benefits under the provisions of Subdivision 4s of Local Rule 80.

_____ Reviewing a default judgment.

_____ Other proceedings: _____

Dated:

7/27/82 /Signature/
Walter E. Black, Jr.
United States District Judge

* Consent of parties required:

I (We) hereby consent to the entry of this order as indicated:

_____
Plaintiff (Counsel for Plaintiff)

_____
Defendant (Counsel for Defendant)

_____
Plaintiff (Counsel for Plaintiff)

_____
Defendant (Counsel for Defendant)

Dated:

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM

vs.

INTERNATIONAL TYPOGRAPHICAL UNION; and BALTIMORE TYPOGRAPHICAL UNION NO. 12; and SUNPAPERS CHAPEL OF BALTIMORE TYPOGRAPHICAL UNION NO. 12; and JACK POIST and GARY KIDWELL; A.S. ABELL PUBLISHING COMPANY

CIVIL NO. B 80-0012

MAGISTRATE'S REPORT AND RECOMMENDATION

I.

Plaintiff, Kondian R. Rajaram, is a member of defendant Union International Typographical Union (ITU), Baltimore Typographical Union No. 12 (BTU-12) and Sunpapers Chapel of Baltimore Typographical Union No. 12 (Sun Chapel). As a union member, he worked as a contract substitute employee on a casual basis for defendant A. S. Abell Publishing Co. (Abell) until July 1978, when substitute work was eliminated. Plaintiff alleges that the elimination of this substitute work was

motivated by intentional discrimination on the parts of all of the defendants.

Plaintiff filed his initial complaint, pro se, on January 4, 1980, naming ITU, BTU-12, Sun Chapel, Poist, and Kidwell as defendants. (Paper #1). On September 13, 1982, plaintiff obtained counsel to represent him, and an amended complaint was filed, with leave of court, on September 24, 1982. (Paper #46). Finally, on January 20, 1983, plaintiff filed a second amended complaint that named, for the first time, Abell as a defendant. (Paper #53). On February 28, 1983, Abell moved for dismissal or, in the alternative, for summary judgment. (Paper #58). By previous order of Judge Black, dated July 27, 1982, the case had been referred to me in accordance with Local Rule 80. The pending motions in the case were all heard on October 12, 1983.

II.

Plaintiff alleges that Abell violated plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., by aiding and assisting the other named defendants in:

(1) maintaining a provision in the Union bylaws that required plaintiff to seek internal Union remedies before he was allowed to resort to a discrimination charge under Title VII;

(2) maintaining a provision in the Union bylaws which forced plaintiff to seek internal Union remedies at considerable expense to plaintiff and that had the effect of prohibiting plaintiff from exercising his Title VII remedies for an indefinite period of time;

(3) limiting plaintiff's employment opportunities by giving a job to a white worker, of lower priority status than plaintiff, which was due plaintiff (contrary to the provisions of 42 U.S.C. § 2000e-2(a) (1)); and

(4) discriminating against plaintiff because of the latter's opposition to Abell's hiring practices (contrary to the provisions of 42 U.S.C. § 2000e-3(a)).

The Court has determined that these claims

under Title VII must be dismissed because plaintiff failed to exhaust his administrative remedies with the EEOC as required under 42 U.S.C. § 2000e-5.

Plaintiff claims that the District Court "has jurisdiction to hear a complaint even though the matter has not been presented to the EEOC, where the failure to present the matter is inadvertent" (Paper #59), and he cites Sharma v. Opportunities Industrialization Center, 342 F. Supp. 209 (E.D. Wis. 1972), in support of this contention. However, in Sharma, the court was faced with the issue of whether plaintiff's failure to comply with the exhaustion requirements under Title VII precluded his action under 42 U.S.C. § 1981. The court held that plaintiff could proceed with his § 1981 action in lieu of his Title VII remedy if there was a reasonable excuse for plaintiff's failure to exhaust his Title

VII remedies. Thus, Sharma is entirely beside the present point.

Plaintiff also cites Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980), in support of his contention that the exhaustion of administrative remedies is not required. However, the court in that case stated that there are strict requirements for the plaintiff to (1) file a charge with the EEOC and 2) receive the right to sue letter from the EEOC and act on it within the requisite time. These requirements can only be relaxed when the plaintiff's failure to sue is due to misleading acts by the EEOC, the employer, or the union. Here, there is no evidence that the EEOC, Abell, or the unions misled plaintiff into believing that he had a complaint only against the unions, rather than against the union and Abell together.

In that plaintiff has never filed an EEOC claim against Abell, he is absolutely barred from proceeding under Title VII against that company. Bickley v. Univ. of Md., 527 F. Supp. 174, 179 (D.Md. 1981).

Plaintiff has had actual knowledge of his Title VII rights since August 30, 1978, yet he has never filed a discrimination claim against Abell with the EEOC. The courts do not treat the charges made to the EEOC as strictly as they would common law pleadings, in that the EEOC can expand the charges made against a specific defendant based on its investigation. EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976). However, the courts do require that a specific defendant be named in the EEOC charge. See Freeman v. Schultz, 468 F.2d 120 (D.C. Cir. 1972) (An oral complaint against an employer with the EEOC that only triggered an informal investigation is

insufficient exhaustion of administrative remedies under Title VII.). Because plaintiff has never filed administrative charges against Abell with the EEOC, and thus never afforded Abell the opportunity to assert its defendants in the administrative forum, plaintiff's Title VII claims should be dismissed.

III.

Plaintiff also claims against Abell under 42 U.S.C. § 2000e-10, alleging that Abell failed to post a proper notice of the employees' rights under Title VII. § 2000e-10 provides:

> (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

> (b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

The issue here is whether a private cause of action for damagaes can be implied under this section. To determine whether a private cause of action is implicit in a statute, several factors must be analyzed. First, plaintiff must be a member of the class for whose benefit the statute was enacted. Second, there must be a legislative intent to create such a remedy. Third, it must be consistent with the underlying purpose of the statute to imply such a remedy for the plaintiff. Finally, it must be ascertained whether the cause of action is traditionally relegated to state law, or whether it would be appropriate to infer a cause of action based solely on federal law. See Cort v. Ash, 422 U.S. 66, 78 (1975). Here, although plaintiff is a member of the class for whom

the statute was enacted, the legislative history indicates that the statute's purpose is to allow the EEOC to prepare or approve notices that set forth excerpts of the title, and to require employers and unions to post these notices in conspicuous places. An employer's or union's willful failure to comply results in fines. H.R. REP. NO. 914, 88th Cong., 2nd Sess., reprinted in 1964 U. S. CODE CONG. & AD. NEWS, 2355, 2407. Thus, the purpose of the statute is only to provide the EEOC with regulatory power (via fines) over the employers and the unions, rather than to create a private remedy for the employees. The Court simply cannot conceive, especially given the elaborate civil remedial provisions of the same subchapter of Title 42 of which § 2000e-10 is a part, that Congress ever intended a private right of action to arise from simple failure to

post notices. None of the other factors in the Cort v. Ash analysis is persuasive otherwise. For this reason, plaintiff's claim under § 2000e-10 must be dismissed.

IV.

Plaintiff also alleges that Abell violated plaintiff's civil rights under 42 U.S.C. §§ 1985, 1986, and 1981, respectively, by: (1) conspiring with the other named defendants to interfere with plaintiff's civil rights; (2) failing to prevent the other named defendants from violating plaintiff's civil righs under § 1985, although allegedly Abell knew of these wrongs and had the power to stop them; and (3) denying plaintiff his right to equal benefits under the law.

However, plaintiff's claims under §§ 1981, 1985, and 1986 must be dismissed because they are barred by the statute of limitations. The statute of limitations

for an action under § 1981 is three (3) years. McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., No. 82-1179 (4th Cir. Jan. 17, 1983). The limitations period for actions under § 1986, as stated in the statute itself, is one (1) year. The statute of limitations for actions under § 1985 is three (3) years, with the cause of action occruing when the plaintiff knows or has reason to know of his injury: "It is the awareness of the facts giving rise to the cause of action, not the awareness that the illegality of the action is conclusively provable that begins the running of the statute of limitations." Lewis v. Clark, 534 F. Supp. 714, 716 (D.Md. 1982). Plaintiff was aware of a possible cause of action as early as August 30, 1978, when he filed a discrimination claim with the EEOC against defendants ITU, BTU-12, and Sun Chapel (Paper #1); however,

plaintiff failed to assert his claim against Abell until almost five years later (January 20, 1983).

Plaintiff asserts, however, that he is entitled to a tolling of the statute of limitations under either the doctrine of fraudulent concealment or the doctrine of continuing violations. The doctrine of fraudulent concealment is set forth in Davis v. Edgemere Finance Co., 523 F. Supp. 1121 (D.Md. 1981). A statute of limitations is tolled when the defendant, by fraudulent means, keeps the potential plaintiff in ignorance of the fact that plaintiff has a cause of action. Plaintiff must prove:

> "(1) fraudulent concealment by the party raising the statute together with (2) the other party's failure to discover the facts which are the basis of his cause of action despite (3) the exercise of due diligence on his part." Since this means of avoiding the statute was created by courts of equity, we adopted their requirement that the facts necessary to show these elements should be distinctly pleaded.... In Stearns v. Page, 48 U.S. (7 How.) 818,

829, 12 L.Ed. 928 (1849), the Court explained the reasons for these essential elements as follows:

> "A complainant, [to avoid the statute of limitations,] must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment, --must specify how, when, and in what manner, it was perpetrated. The charges must be definite and reasonably certain, capable of proof, and clearly proved.... And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made."

Davis, 523 F. Supp. at 1125 (footnote omitted).

Plaintiff has alleged that Abell and the other named defendants "participated in involved, convoluted transactions" which resulted in the denial of plaintiff's civil rights; that the "complexity of occurrence were such that" plaintiff should not have been expected to "comprehend the nature of involvement of the various parties" and

that plaintiff was unaware of potential remedies "because facts were concealed and transactions hidden"; plaintiff asserts that he has "actively pursued" all remedies to the best of his ability. These contentions are unsupported by any specific factual allegations, as required under the Davis test. The plaintiff's counsel was unable to articulate specific facts pertaining to the alleged fraudulent concealment at the October 12 hearing, other than to refer to Mr. Rajaram's speculations as to the existence of a conspiracy between Abell and the unions. This speculation is clearly insufficient under Davis.

Plaintiff asserts, also, that he was unable to discover Abell's involvement in these discriminatory transactions until November 1982, when fully advised by new counsel, and therefore was unable previously to obtain knowledge of his injury

and the cause of his injury. Thus, he claims that the statute of limitations was tolled until November, 1982 under the standards sest forth in United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, the plaintiff sued under the Federal Tort Claims Act for the VA's negligent administration of an antibiotic that caused a permanent hearing loss. Although plaintiff sought care for the hearing loss shortly after the original treatment and was told that the medication could have caused his hearing impairment, it was not until threee years later that he was advised by a physician that the medicine was negligently administered. It was then that plaintiff instituted suit. Although the Court recognized that a cause of action did not accrue until the plaintiff was aware of his injury and its cause, plaintiff did not have to be aware that the doctor's

conduct was legally blameworthy before the cause of action accrued. The Court noted that it was "unconviced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment," Kubrick, 444 U.S. at 122, and it held that plaintiff's cause of action was barred by the two (2) year statute of limitations.

In this case, plaintiff's reliance in Kubrick is misplaced. The rule in Kubrick has been held inapplicable outside of medical malpractice situations. See Wilkinson v. United States, 677 F.2d 998, 1002 (4th Cir.), cert. denied, 103 S.Ct. 209 (1982). Also, plaintiff has equated the "cause of injury" discussed in Kubrick with legal liability, rather than, as in Kubrick, connecting the cause of injury with a mechanical "but for" event. Mr.

Rajaram was aware of his injury (abridgement of his civil rights) and the cause of his injury (the defendants' alleged failure to comply with seniority priorities, etc.) as early as August 30, 1978. The claim that he was ignorant of his legal right to sue Abell along with the other named defendants is not sufficient to toll the running of the statute of limitations. As the Court noted in Kubrick, once the plaintiff is aware of his injury and the cause of his injury, the onus is upon him to seek professional advice; to hold otherwise would defeat one purpose of the statute of limitations of preventing stale claims from being raised. See Kubrick, 444 U.S. at 118.

Plaintiff further contends that he is entitled to a tolling of the statute of limitations under the doctrine of continuing violations. However, a "continuing violation is occasioned by

continual unlawful acts, not continual ill effects from an original violation." Ocean Acres v. Dare Co. Board of Health, Nos. 82-1458, 82-1489 (4th Cir. May 12, 1983). Assuming, arguendo, that there was discrimination by Abell that constituted a series of acts during the employer-employee relationship, this would not allow plaintiff to sue Abell in 1983, because his employment with the company ended in 1978; plaintiff would have had to have sued within three (3) years of his discharge in order to invoke the continuing violations remedy. See Williams v. Norfolk & W. Ry. Co., 530 F.2d 539 (4th Cir. 1975). Because plaintiff has failed to show that he met the requirements under either the doctrine of fraudulent concealment or the doctrine of continuing violations, he is time-barred from raising his claims under 42 U.S.C. §§ 1981, 1985, and 1986.

V.

Plaintiff has alleged that Abell breached a collective bargaining agreement, in violation of § 301 of the Taft Hartley Act, 29 U.S.C. § 185. This claim, however, must be dismissed because it is barred by the six (6) month statute of limitations applicable to § 301 breach of contract actions. DelCostello v. International Brotherhood of Teamsters, 51 U.S.L.W. 4693 (1983).

VI.

Plaintiff further alleges that Abell engaged in unfair labor practices in violation of § 8(a) of the Taft-Hartley Act, 29 U.S.C. § 158(a), by its participation with the other named defendants in discriminatory hiring and tenure practices. This claim must be dismissed because this Court does not have subject matter jurisdiction. Section 8(a)

claims are within the exclusive jurisdiction of the NLRB. While the District Court can have jurisdiction over a § 301 claim concurrent with the NLRB's jurisdiction over a § 8(a) claim, see Smith v. Evening News Association, 371 U.S. 195 (1962); Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders Assn., 646 F.2d 117 (4th Cir. 1981), a § 8(a) claim can only be brought before the NLRB.

VII.

Finally, plaintiff has raised a state law contract claim against Abell, alleging that: "The plaintiff was not compensated for the years of service rendered." State law claims are appropriate for the Court's determination if they form a separate but parallel ground for relief sought in a substantial claim based on federal law. However, where, as here, the federal claims are insubstantial, the federal court should

not assume jurisdiction over the state claim: "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Therefore, this state claim should also be dismissed.

VIII.

For the reasons stated above, I respectfully recommend that, upon the expiry of time allowed in Local Rule 82 and FED. R. CIV. P. 72 for taking exception hereto, an order be entered granting defendant Abell's motion to dismiss.

/Signature/
Frederic N. Smalkin
United States Magistrate

Dated: October 18th, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM

vs.

INTERNATIONAL TYPOGRAPHICAL UNION; and BALTIMORE TYPOGRAPHICAL UNION NO. 12; and SUNPAPERS CHAPEL OF BALTIMORE TYPOGRAPHICAL UNION NO. 12; and JACK POIST and GARY KIDWELL; A.S. ABELL PUBLISHING COMPANY

CIVIL NO. B 80-0012

O R D E R

Upon consideration of the Magistrate's Report and Recommendation dated October 18, 1983, and upon the expiry of time allowed in Local Rule 82 and FED. R. CIV. P. 72 for taking exception hereto, IT IS, this 6th day of November, 1983, by the United States District Court for the District of Maryland, ORDERED:

1. That the Magistrate's Report and Recommendation BE, and the same hereby IS, ADOPTED;

2. That defendant Abell's motion to dismiss BE, and the same hereby IS, GRANTED;

and

3. That the Clerk of Court mail copies of this Order to counsel for the parties.

/Signature/
Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM

v.

INTERNATIONAL TYPOGRAPHICAL UNION, ET AL.

Civil Action No. B 84-2465

ORDER OF REFERENCE

TO UNITED STATES MAGISTRATE

In accordance with Local Rule 80 of the United States District Court for the District of Maryland, this case is hereby referred to the Honorable FREDERIC N. SMALKIN, United States Magistrate for the said District, for the following purpose(s):

* _____ Trial

* _____ Service as Special Master in other than complex cases (see Rule 53(b), F. R.

Civ. P. and 28 U.S.C. §636(b)(2).

_____ Service as Special Master in a complex case.

_____ Processing and disposition in accordance with Rules Governing Cases under 28 U.S.C. §2254 and §2255.

_____ Processing and disposition as a complaint challenging conditions of confinement filed under 42 U.S.C. §1983.

XX Hearing and determination of non-dispositive pre-trial matters as follows: (All);

XX Hearing, proposing findings of fact, and making recommendations as to dispositive pre-trial matters as follows: (All);

_____ Ordering and conducting supplementary proceedings in accordance with Maryland Rule of Procedure 628.

_____ Specially appointing process servers pursuant to Rule 4(c), F. R. Civ. P.

_____ Reviewing administrative determinations (pursuant to 42 U.S.C. §405(g) as to Social Security or related benefits under the provisions of Subdivision 4s of Local Rule 80.

_____ Reviewing a default judgment.

_____ Other proceedings: _____

Dated:

Oct. 29, 1984

/Signature/
Walter E. Black, Jr.
United States District Judge

* Consent of parties required:

I (We) hereby consent to the entry of this order as indicated:

_____
Plaintiff (Counsel for Plaintiff)

_____
Defendant (Counsel for Defendant)

_____
Plaintiff (Counsel for Plaintiff)

_____
Defendant (Counsel for Defendant)

Dated:

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Kondian R. Rajaram, Plaintiff

v.

International Typographical Union, et al.,
Defendants

Civil No. B 80-0012

MAGISTRATE'S REPORT AND RECOMMENDATION

This case involves an attempt by plaintiff, Kondian R. Rajaram, to revive a discrimination suit filed in 1980. The history of this case is fully documented in the numerous briefs, memoranda, and orders which are a part of the record, therefore, only the most pertinent facts will be discussed. Although plaintiff filed this action in 1980, he did not name A.S. Abell Publishing Company ("Abell") as a defendant until his second amended complaint, filed in 1983.1/ Pursuant to

my Report and Recommendation,2/ subsequently adopted by the Court,3/ Abell was dismissed from this action. Plaintiff than filed the pending "Motion for Revision of Interlocutory Order of Court."4/

1/ Paper no. 53.
2/ Paper no. 107.
3/ Paper no. 113.
4/ Paper no. 146.

Abell has filed an opposition to plaintiff's motion, and plaintiff has filed a reply thereto.

I.

A.

In his motion for revision, plaintiff claims that new evidence has been discovered that demonstrates misrepresentation and fraudulent concealment by Abell, with respect to a 1977 arbitration award. Plaintiff asserts that such evidence would have a conclusive effect on the final determination of the merits of his claim against Abell.

According to plaintiff, his claim is now being timely asserted, because he diligently searched for this new evidence, but only now has found it, due to the obstruction of the defendants.

Abell opposes plaintiff's motion, on the grounds that plaintiff's claims are speculative, and the claim is asserted beyond the period of limitations. Abell also contends that plaintiff has not met the standard for reconsideration. Abell requests that this Court certify the order of Abell's dismissal under Fed. R. Civ. P. 54(b), direct the entry of final judgment in its favor, and award it costs for opposing plaintiff's motion.

Plaintiff replies that the newly discovered evidence entitled him to a tolling of the limitations period, until after such evidence was discovered. Furthermore, plaintiff argues that Abell

has not met the standard allowing for a Rule 54(b) order to be entered and, finally, that the Court, at oral argument on October 12, 1983, expressly gave plaintiff leave to bring Abell back into this case if new evidence was subsequently obtained.

B.

At the outset, it should be noted that plaintiff's motion was clearly not made within the time limits for taking exception to my earlier Report and Recommendation. Fed. R. Civ. P. 72; Local Rule 82. Therefore the motion must be viewed as a motion to revise under Rule 54(b). Plaintiff also brought his motion, in the alternative, under Rule 60(b). However, Rule 60(b) is applicable only to a final judgment, which has not yet been entered in this case. To a certain extent, Abell recognizes that Rule 60(b) is inapplicable, because Abell has requested

the court's entry of a Rule 54(b) certification.

Rule 54(b) applies to judgments upon multiple claims or involving multiple parties, and provides, in pertinent part, that where an order has been entered partially adjudicating a case, but without an express determination of "appealable finality" under Rule 54(b), "...the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Nevertheless, Abell urges the point that a party requesting revision must meet certain standards which give the Court a reason for reexamining its ruling. Abell contends that under the "law of the case" doctrine, "...a court ordinarily will not reconsider its own decision...absent clear and convincing reasons to examine the prior

ruling." Gertz v. Robert Welch, Inc., 680 F.2d 527, 532 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983). In U.S. v. U.S. Smelting Refining & Mining Co., 339 U.S. 186, 198 (1950), it was held that the law of the case doctrine applies only "...when an issue is once litigated and decided...." (emphasis added). Arguably plaintiff's claim of new evidence presents an issue that has not been previously decided. Therefore, this Court does not believe that the law of the case doctrine bars plaintiff's motion for revision under Rule 54(b).

C.

Abell contends that plaintiff's assertions of misrepresentation and fraudulent concealment are speculative, and are also deficient because such claims were rejected by a prior order of this Court. Specifically, plaintiff claims that Abell

maliciously and intentionally concealed from plaintiff certain facts regarding the 1977 arbitration award. Plaintiff also claims that Abell acted in concert with the Union defendants to conceal such facts. Plaintiff points out that his motion is supported by factual statements verified under oath.

Plaintiff's claims are conclusory in nature and not supported by specific facts, in spite of the fact that his motion is verified under oath. In my earlier Report and Recommendation, I held that plaintiff's previous claims of fraudulent concealment were not supported by specific factual allegations. In that Report, this court applied the test of Davis v. Edgemere Finance Co., 523 F.Supp. 1121 (D. Md. 1981) to plaintiff's claim of fraudulent concealment with respect to the statute of limitations. Plaintiff's claim of

fraudulent concealment in the present motion also appears to be advanced in order to escape the bar of the limitations period. Therefore this Court holds that the law as stated in my earlier Report, adopted by the Court, is controlling, and, therefore, it finds plaintiff's present claim of fraudulent concealment to be insufficient. Plaintiff's claim of misrepresentation is likewise unsupported by facts and, thus, also is deficient.

D.

Abell raises the point that plaintiff's motion should be denied because it is untimely. Abell claims that plaintiff discovered the alleged new evidence eleven months after Abell was dismissed from this action. Abell cites some cases that allow setting aside an interlocutory order only where due diligence is employed in connection with seeking a rehearing. See

Faim Information Services, Inc. v. Borchert, 395 F.Supp. 878, 881 (S.D. N.Y. 1975). Plaintiff's reply to this point indicates that the parties are in dispute as to when the alleged new evidence was obtained. This Court notes that plaintiff has extended his case over an extraordinary period of time, but finds it unnecessary to rule on the timeliness of plaintiff's motion in light of the ultimate outcome of this motion.

II.

Abell has requested, in an attempt to curtail the relitigation of old claims, an order directing the entry of judgment in its favor under Fed. R Civ. P. 54(b). Rule 54(b) provides in pertinent part:

> When more than one claim for relief is presented in an action ... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express

direction for the entry of judgment.

Abell contends that the court's order, dismissing Abell from this action "disposes of a cognizable claim for relief," and "there is no just reason for delay."

The purpose of Rule 54(b) is to make an immediate appeal available and thus avoid delay in entering judgment on a separate claim, or as to fewer than all the parties until final judgment on the entire case.

> The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides a much needed certainty in determining when a final and appealable judgment has been entered.

10 Wright, Miller & Kane, Federal Practice and Procedure: Civil §2654 (1983). At least one claim, or the rights and liabilities of at least one party must be decided in order to invoke Rule 54(b). However, "...it

is not necessary that the rights and liabilities of a party or the claim must be decided on the merits." Id. at §2656.

This court, in the case of J. Aron & Company, Inc. v. Service Transp. Co., 515 F.Supp. 428, 432 (D. Md. 1981), relying upon Sears, Roebuck & Co. v. Mackey, 351 U.S. 428 (1956), held that the following steps are necessary in making a Rule 54(b) certification:

> First it must be determined that the judgment under consideration is a "final judgment." A "judgment" in the sense that it is a decision upon a cognizable claim for relief, and "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a muiltiple claims action." Second, the court must determine whether there is any just reason for delay.

In this case Abell was only one of several defendants. It is clear that the court's dismissal of Abell terminated the action as to it. As such, the court's dismissal is a final judgment under the definition in J. Aron, supra. There is no just reason

for delay in entering an order under Rule 54(b) certifying Abell's dismissal as a final judgment. Although there is a strong federal policy against piecemeal review, Rule 54(b) certification is proper in a case as protracted as this. This case has been before the court for over four years, and Abell's dismissal is one of the first dispositive developments in the litigation. Rather than to allow Abell's dismissal to remain interlocutory (and thus subject to yet further attempts to revise the claim against Abell), the prudent course would be to enter a Rule 54(b) certification and to allow plaintiff to appeal Abell's dismissal if that be his desire.

III.

Abell has also asked the Court for an order requiring plaintiff and his attorneys to pay expenses and attorney's fees incurred in opposing plaintiff's

motion for revision. Abell views plaintiff's motion as vexatious, frivolous and intended to harass. Abell argues that costs are authorized against a lawyer who "...multiplies the proceedings in any case unreasonably and vexatiously...." 28 U.S.C. §1927. In addition, Abell argues that plaintiff's attorney's actions contravene Fed. R. Civ. P. 11, and, accordingly, that sanctions should be imposed against plaintiff.

Plaintiff opposes Abell's claim, contending that Abell's assertions are themselves vexatious and frivolous, and therefore, costs and fees should be awarded to plaintiff.

Although this court believes that plaintiff's motion for revision is insufficient as a matter of law, it is not prepared to characterize the motion as either vexatious or frivolous. Therefore

this court declines to award Abell costs and fees under 28 U.S.C. §1927 or Rule 11. However, because Abell is the prevailing party, and it will no longer be a party to this action if its dismissal is certified under Rule 54(b), it is entitled to costs as provided for in Rule 54(b). Abell should comply with the Local Rule 23 in submitting its bill of costs.

For the above reasons, it is, this 14th day of December, 1984, RECOMMENDED THAT:

1. Plaintiff's motion for revision be DENIED;

2. Abell's request for entry of final judgment under Rule 54(b) be GRANTED, and that the Court find that there is no just reason for delay and direct entry of final judgment as to the dismissal of Abell from this suit; and

3. Abell be awarded costs, pursuant to

Rule 54(b), as the prevailing party in this action.

This Report and Recommendation is made pursuant to the provisions of FED. R. CIV. P. 72, for taking exception hereto.

/Signature/
Frederic N. Smalkin
United States Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Kondian R. Rajaram, Plaintiff

v.

International Typographical Union, et al.,

Defendants

Civil No. B 84-2465

MEMORANDUM AND ORDER

presently pending before the Court is Mr. Rajaram's motion to remand this action to state court.

In this action, Rajaram has sued the A.S. Abell Publishing Company ("Abell") and a number of Union defendants. Rajaram originally brought this action in the Circuit Court for Baltimore City. Upon the defendants' petition, the suit was removed to this court pursuant to 28 U.S.C. §1441. 1/

1/ See paper no.'s 1-5.

Mr. Rajaram alleges that Abell failed fully to perform its obligations

under an agreement that was reached in an arbitration proceeding. With respect to the Union defendants, Rajaram alleges that they intentionally withheld information from him and other beneficiaries of the arbitration award and, also, that they breached their contractual duty of fair representation to him.

Mr. Rajaram has another case pending in this Court against the same defendants: Rajaram v. International Typographical Union, et. al., B-80-0012. There are similar issues pending in each case, and some of them have been ruled upon; however, this Court will not address any issues of res judicata at this time, because the pending motion deals only with Mr. Rajaram's attempt to remand this case to state court. If remand is denied, this Court will grant Mr. Rajaram an appropriate amount of time in which to respond to the

defendants'motion to dismiss, pursuant to Judge Hargrove's order of July 23, 1984. 2/

2/ Paper no. 14.

I.

Mr. Rajaram alleges that the defendants removed this case to federal court because they believe that his cause of action is based on a collective bargaining agreement between Abell and the Union defendants. If Rajaram's cause of action is based on a collective bargaining agreement, th[a]n this court has original jurisdiction under the Labor Management Relations Act, 1947, §301, as amended, 29 U.S.C. §185 (hereinafter referred to as §185). However, plaintiff argues that this action is not based on any collective bargaining agreement.

According to Rajaram, his cause of action is based on an agreement between all the parties, whereby they agreed to be bound by arbitration. Rajaram contends that it

is questionable whether there even was a collective bargaining agreement in effect at the relevant times. Moreover, Rajaram contends that the parties not only agreed to be bound by arbitration, but also agreed to ignore any collective bargaining agreement. 3/

3/ Rajaram's declaration, filed in the Circuit Court for Baltimore City (paper no. 4), states in Count II, paragraph 4:

> 4. All parties agreed to be bound by the Arbitrator's determination without regard to arbitrability of the issues or status of the Collective Bargaining Agreement.

Rajaram claims that because his cause clearly does not involve a collective bargaining agreement, §185 is not implicated and therefore this Court cannot divest the State Circuit Court of jurisdiction. Rajaram supports his claim with an affidavit of Theodore J. Kees, President of Baltimore Typographical Union ("BTU"), Local no. 12, the collective

bargaining agent of the composing room employees of Abell. In his affidavit, Kees states that between January 1, 1977, and July 6, 1978, members of Local no. 12 were without a collective bargaining agreement. Rajaram claims that he is not asking for enforcement of a collective bargaining agreement, and that, therefore, the Court should not deal with it.

Finally, Rajaram claims that defendants' strategy to remove this case from state court to federal court, and th[a]n move for dismissal, is a frivolous, self-defeating tactic which this Court should not allow. See Baas v. Elliot, 71 F.R.D. 693 (E.D. N.Y. 1976).

II.

Defendants oppose Rajaram's motion to remand, on several grounds. Defendants contend that the arbitration award in question was rendered under a collective

bargaining agreement; therefore, federal jurisdiction exists under §185 and 28 U.S.C. §1441. In addition, defendants contend that Rajaram's suit alleges a breach of the Union defendants' duty of fair representation and breach of a labor contract by Abell, which also implicates §185.

Defendants argue that §185 does not limit jurisdiction to actions concerning collective bargaining agreements, but, rather, covers violations of contracts between employers and labor organizations. According to defendants, the agreement of Abell and the Union defendants to be bound by the arbitrator's decision, regardless of any collective bargaining agreement, is a labor contract under §185. Defendants further contend that §185 gives the Court jurisdiction to interpret a collective bargaining agreement and that Rajaram's

claims concerning the arbitration award require the Court to interpret the collective bargaining agreement. Defendants argue that such interpretation is at the heart of Rajaram's claims. Defendants also argue that in addition to conferring jurisdiction existing with respect to Abell for breach of a labor contract, §185 also gives the Court jurisdiction over Rajaram's claim of the Union defendants' breach of duty.

Lastly, defendants claim that because the arbitrator referred repeatedly to the collective bargaining agreement and because the affidavit of Kees states that an oral agreement existed between Abell and the Union defendants (although not a formal collective bargaining agreement), jurisdiction exists under §185.

III.

Section 185(a) reads as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to th[a] amount in controversy or without regard to the citizenship of the parties.

It is evident that the statute itself is not limited to collective bargaining agreements: indeed, that term is not even mentioned. Instead, the broader term "labor contract" is used. Courts have construed the term "labor contract" to encompass more than collective bargaining agreements. See, e.g., Retail Clerks v. Lion Dry Goods, 369 U.S. 17, 23-28 (1962) (the term "contracts" as used in §185(a) is not limited to traditional collective bargaining agreements); Burlesque Artists Association v. American Guild of Variety Artists, 187 F.Supp. 393, 394 (S.D. N.Y. 1958) (the word "contracts" in §185 is not

restricted to contracts arising out of collective bargaining, but means contracts in the customary and accepted meaning of the word). Of course, although the term "labor contract" includes a collective bargaining agreement, the two terms are not mutually exclusive. See Parks v. International Brotherhood of Electrical Workers, 203 F.Supp. 288 (D. Md. 1962) (Federal courts should take a broad view of the jurisdiction granted by §185), rev'd on other grounds, 314 F.2d 889 (4th Cir.), cert. denied, 372 U.S. 976 (1963); see also Deaton Truck Line, Inc. v. Local Union 612, 314 F.2d 418 (5th Cir. 1962). Moreover, arbitration conducted without regard to a collective bargaining agreement has been found to be a contract within the meaning of §185. Minot Builders Supply Association v. Teamsters Local 123, 703 F.2d 324, (8th Cir. 1983).

Having determined that §185 includes not only collective bargaining agreements, but also other types of labor contracts, the next inquiry is whether the arbitration agreement in question, which Rajaram alleges was violated, is a labor contract. This Court holds that it is. In Retail Clerks, supra, the Court held:

> [c]ontract in labor law is a term the implications of which must be determined from the connection in which it appears. (citation omitted) It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them.

369 U.S. at 28.

In the present case, the agreement to be bound by arbitration was clearly an agreement of a type designed to maintain "labor peace" between an employer and a labor organization. Therefore, this Court holds that the arbitration agreement is a labor contract and, consequently, that jurisdiction exists to adjudicate Mr.

Rajaram's complaint.

This Court notes that Rajaram contends that no federal jurisdiction exists under the rule stated in Byrne v. Mass Transit Administration, 58 Md. App. 501, 473 A.2d 956 (1984). However, Rajaram's reliance on that case is misplaced because that case is not dispositive. In Byrne, no jurisdiction existed because the defendant employer was a state agency and thus exempt from federal labor laws. 58 Md. App. at 506-507. See 29 U.S.C. §152(2).

Therefore, this Court does not find it necessary to rule on the existence vel non of a collective bargaining agreement, because jurisdiction otherwise exists under §185(a).

However, because Rajaram's suit alleges two different claims against the defendants, it is necessary to determine if jurisdiction exists as to each defendant.

Rajaram's claim against Abell is based on an alleged violation of the arbitration agreement. For Rajaram to prevail against Abell, he must prove a breach of that agreement, a labor contract. Thus, based on the analysis above, jurisdiction exists as to Abell. Rajaram's claim against the Union defendants is based upon the alleged breach of the Union's duty of fair representation. Jurisdiction also exists with respect to the Union defendants, because the claim of breach of a labor contract and breach of the duty of fair representation "are inextricably interdependent." DelCostello v. International Brotherhood of Teamsters, ___ U.S. ___, 103 S.Ct. 2281, 2290 (1983). In that case, the Supreme Court termed such a suit "a hybrid §301 [§185]/fair representation claim." DelCostello, 103 S.Ct. at 2291. See also, Diaz v. Schwerman

Trucking Company, 709 F.2d 1371 (11th Cir. 1983); Thomas v. consolidation Coal Company, 380 F.2d 69, 76,n.7,77 (4th Cir. 1967).

IV.

Rajaram's reliance on Baas v. Elliot, 71 F.R.D. 693 (E.D. N.Y. 1976), to the effect that the defendants' action in removing this case to federal court was frivolous, has no merit at all. In Baas, the defendants removed a case from state court, alleging federal jurisdiction, and upon removal, sought dismissal for lack of federal jurisdiction. In this case, because federal jurisdiction exists, removal was proper. Avco Corp. v. Aero Lodge SNo. 735, 390 U.S. 557 (1968); 28 U.S.C. §1441. Therefore, defendants have the right to utilize all defenses, including, but not limited to, a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6).

See, e.g., Home Health Services, Inc. v. Currie, 531 F.Supp. 476, 478 (D. S.C. 1982) (stating that "the test for determining the existence of a federal question under 28 U.S.C. §§1331 and 1441 and the test for determining the existence of a viable claim under Fed. R. Civ. Proc. 12(b)(6) and 56(b) are entirely separate and distinct"), Aff'd, 706 F.2d 497 (1983); Seal v. Industrial Electric, Inc., 362 F.2d 788, 789 (5th Cir. 1966) (stating that "a removed case proceeds according to Federal procedural rules as though it had originally been commenced in the Federal court").

For the above reasons, it is, this 1st day of February 1985, by the United States District Court for the District of Maryland,

ORDERED that:

Plaintiff Rajaram's motion to remand this action to State Court be DENIED;

Plaintiff has until February 22, 1985 in which to file a response to defendants' motion to dismiss; and

The Clerk shall mail copies of this Memorandum and Order to counsel of record for the parties.

This order is made subject to the provisions of Fed. R. Civ. P. 72 for taking exception hereto.

/Signature/
Frederic N. Smalkin
United States Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM PLAINTIFF

VS.

INTERNATAIONAL TYPOGRAPHICAL UNION, ET AL

DEFENDANTS

CIVIL DOCKET B-80-0012

BALTIMORE, MARYLAND FEBRUARY 8, 1985

THE ABOVE ENTITLED MATTER CAME ON FOR A MOTIONS HEARING IN THE UNITED STATES DISTRICT COURT BEFORE THE HONORABLE WALTER E. BLACK, JR., BEGINNING AT 10:00 O'CLOCK A.M.

APPEARANCES

FOR THE PLAINTIFF:

EDWARD J. MAKOWSKI, ESQUIRE

PHILLIP MIZRACH, ESQUIRE

FOR THE DEFENDANTS:

JEFFREY P. AYRES, ESQUIRE

ROBERT HENRY, ESQUIRE

PATTY L. PARSONS, ESQUIRE

BERNARD W. RUBENSTEIN, ESQUIRE

REPORTED BY:-

E. EDWARD RICHARDSON

OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT

583 UNITED STATES COURTHOUSE

BALTIMORE, MARYLAND 21201

539-0034

((pages 42-47))

ORAL OPINION

THE COURT: COUNSEL I WILL RULE ON THIS PENDING MATTER THIS MORNING OR THIS AFTERNOON OR WHATEVER IT IS BY MEANS OF AN INFORMAL ORAL OPINION RESERVING THE RIGHT TO EDIT THAT OPINION IF FOR ANY REASON IT'S TRANSCRIBED WITHOUT IN ANYWAY CHANGING THE RESULT OR THE ESSENTIAL MEANING.

IN THIS EMPLOYMENT DISCRIMINATION CASE, MAGISTRATE SMALKIN HAS FILED THREE REPORTS AND RECOMMENDATIONS. EXCEPTIONS HAVE BEEN FILED TO TWO OF THESE BY ONE OR

MORE OF THE PARTIES. THE SECOND OF THOSE THREE IS THE SUBJECT MATTER FOR A LATER HEARING SHORTLY. HOWEVER, I DO WANT TO BRIEFLY REFER TO THE FIRST REPORT AND RECOMMENDATION SINCE IT IS INTERRELATED TO THE THIRD REPORT AND RECOMMENDATION WHICH WE ARE DISCUSSING THIS MORNING.

THE FIRST REPORT AND RECOMMENDATION WAS PAPER NUMBER 107 IN THE COURT FILE. THIS WAS FILED BY THE MAGISTRATE ON OCTOBER 20, 1983 AND ADOPTED IN ITS ENTIRETY BY THE COURT ON NOVEMBER 6, 1983 IN PAPER NUMBER 113.

NO EXCEPTIONS WERE FILED BY ANY OF THE PARTIES AND THAT REPORT AND RECOMMENDATION DISMISSED A NUMBER OF THE PLAINTIFF RAJARAM'S CLAIMS DUE TO EITHER FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES BECAUSE NO PRIVATE RIGHT OF ACTION EXISTS OR BECAUSE OF THE STATUTE OF LIMITATIONS.

IN ADDITION, DEFENDANT A. S.

ABELL'S MOTION TO DISMISS WAS GRANTED. NOW, IN TALKING ABOUT THE THIRD REPORT AND RECOMMENDATION WHICH IS PAPER NUMBER 150 IN THE COURT FILE, FIRST OF ALL IT SHOULD BE NOTED THAT NO PARTY FILED EXCEPTIONS TO THE FIRST REPORT AND RECOMMENDATION.

HOWEVER, ALMOST ONE YEAR AFTER THAT REPORT WAS ADOPTED BY THE COURT, RAJARAM MOVED TO HAVE THE COURT VACATE OR REVISE, ITS ORDER OF ADOPTION. ABELL, THE PARTY DISMISSED BY THE COURT'S ORDER OPPOSED RAJARAM'S MOTION AND IN THIS THIRD REPORT THE MAGISTRATE HELD THAT THE FIRST REPORT WAS CONTROLLING, AND RECOMMENDED THAT THE COURT DENY RAJARAM'S MOTION, ENTER A CERTIFICATION OF FINAL JUDGMENT FOR ABELL, AND DENIED ABELL ATTORNEY'S FEES.

RAJARAM FILED EXCEPTIONS TO THIS REPORT, AND ABELL RESPONDED THERETO. NOW, AS I STATED, THE PLAINTIFF HAS MOVED THE COURT TO REVISE, REVERSE, MODIFY, OR REMAND

THIS REPORT. IN THIS REPORT, THE MAGISTRATE RELIED ON DAVIS V. EDGEMERE FINANCE COMPANY, 523 F. SUPP. 1121 IN THIS DISTRICT IN 1981 IN DETERMINING THAT RAJARAM'S CLAIM OF NEW EVIDENCE, REGARDING HIS CLAIM OF FRAUDULENT CONCEALMENT AND MISREPRESENTATION TO BE INSUFFICIENT TO ESCAPE THE BAR OF THE STATUTE OF LIMITATIONS.

RAJARAM ARGUES THAT HIS PLEADINGS MEET THE TEST OF DAVIS. IN DAVIS, THE COURT RELIED ON STEARNS V. PAGE, 48 U.S. 818 IN 1849 IN HOLDING THAT, AND I AM QUOTING IN SUBSTANCE, A COMPLAINANT, TO AVOID THE STATUTE OF LIMITATIONS MUST STATE IN HIS BILL DISTINCTLY THE PARTICULAR ACT OF FRAUD, MISREPRESENTATION OR CONCEALMENT, MUST SPECIFY HOW, WHEN, AND IN WHAT MANNER IT WAS PERPRETRATED. THE CHARGES MUST BE DEFINITE AND REASONABLY CERTAIN, CAPABLE OF PROOF, AND CLEARLY PROVED, AND ESPECIALLY MUST THERE BE DISTINCT AVERMENTS AS TO THE

TIME WHEN THE FRAUD, MISTAKE, CONCEALMENT, OR MISREPRESENTATION WAS DISCOVERED, AND WHAT THE DISCOVERY IS, SO THAT THE COURT MAY CLEARLY SEE, WHETHER, BY THE EXERCISE OF ORDINARY DILIGENCE, THE DISCOVERY MIGHT NOT HAVE BEEN BEFORE MADE.

THAT'S A QUOTE FROM DAVIS AT PAGE 1126. RAJARAM'S MOTION FOR REVISION PRESENTS MERE CONCLUSIONS OF FRAUDULENT CONCEALMENT AND DOES NOT MEET THE DAVIS TEST.

THE FACT THAT THE ATTORNEY FOR THE DEFENDANT UNION REFUSED TO RELEASE INFORMATION CONCERNING THE ARBITRATION PROCEEDING DOES NOT STATE A PARTICULAR ACT OF FRAUD, MISREPRESENTATION, OR CONCEALMENT. NOR DOES THE FACT THAT THE ARBITRATOR REFUSED TO RELEASE DOCUMENTS TO RAJARAM, WITHOUT THE CONSENT OF ALL THE PARTIES, STATE A CLAIM OF FRAUDULENT CONCEALMENT.

SUCH ALLEGATIONS DO NOT NEARLY MEET THE DAVIS TEST. TO EXERCISE ORDINARY DILIGENCE, RAJARAM SHOULD HAVE ASKED THE COURT FOR HELP IN DISCOVERY, OR SUBPOENAED THE NLRB INSTEAD OF GOING THROUGH THE SLOW PROCESS OF OBTAINING INFORMATION FROM A FREEDOM OF INFORMATION ACT REQUEST.

RAJARAM'S CLAIM THAT THE DEFENDANTS KNEW, OR SHOULD HAVE KNOWN, THAT HE WAS ENTITLED TO MORE MONEY FROM THE ARBITRATION AWARD IS A MERE ALLEGATION, CONCLUSORY IN NATURE, AND DOES NOT PRESENT FACTS SUFFICIENT FOR THE COURT TO VACATE OR REVISE ITS ORDER.

RAJARAM ALSO CONTENDS THAT ENTERING FINAL JUDGMENT FOR ABELL VIOLATES THE FEDERAL POLICY AGAINST PIECEMEAL LITIGATION BECAUSE ABELL IS A DEFENDANT IN HIS OTHER CASE, RAJARAM VERSUS THE UNION, WHICH IS B-84-2465.

THE POLICY AGAINST PIECEMEAL

LITIGATION IS NOT VIOLATED HERE BECAUSE THAT POLICY EXTENDS TO PARTIES IN THE SAME CASE, NOT A DIFFERENT CASE.

ABELL'S DISMISSAL FROM HIS CASE IS CLEAR AND UNAMBIGUOUS AND, MEETS THE CRITERIA NECESSARY FOR A CERTIFICATION OF FINAL JUDGMENT PURSUANT TO RULE 54(B). THEREFORE, THE COURT ADOPTS THE REPORT IN THIS RESPECT.

AND FURTHERMORE BEACAUSE RAJARAM'S MOTION DOES NOT PRESENT ANYTHING WHICH ENTITLES HIM TO REVISION OF THE COURT'S ORDER, RAJARAM'S OBJECTIONS ARE OVERRULED AND THE THIRD REPORT AND RECOMMENDATION IS ADOPTED IN ITS ENTIRETY AND THE COURT WILL ENTER A FORMAL ORDER IN CONFORMITY WITH THIS ORAL OPINION.

SO AT LEAST, MR. AYRES, AS TO YOU, I GUESS YOU ARE EXCUSED.

MR. AYRES: THANK YOU.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM, Plaintiff

v.

INTERNATIONAL TYPOGRAPHICAL UNION, et al.,
Defendants

CIVIL ACTION NO. B-80-0012

ORDER

Upon consideration of Plaintiff's Exceptions and Objections to Report and Recommendation of the United States Magistrate and Defendant A.S. Abell's Response thereto, and having heard the respective oral arguments of all interested parties, at a hearing herein this date; in accordance with the Court's oral opinion rendered at the conclusion of oral argument, IT IS, this 8th day of February, 1985,

ORDERED, that Plaintiff's Exceptions and Objections shall be, and the

same hereby are, OVERRULED: and it is further

ORDERED, that the recommended disposition in Magistrate Smalkin's Report and Recommendation of December 14, 1984, shall be, and hereby is, ADOPTED IN ITS ENTIRETY: and it is further

ORDERED, that Plaintiff's Motion for Revision of this Court's Order of November 6, 1983, which dismissed Defendant A.S. Abell from this case, shall be, and the same hereby is, DENIED: and it is further

ORDERED, that in conjunction with the Order of November 6, 1983, FINAL JUDGMENT is hereby directed to be entered in favor of Defendant A.S. Abell and against Plaintiff under Rule 54(b), F.R.Civ.P., there being no just reason for delay; and it is further

ORDERED, that Defendant A.S. Abell shall be, and hereby is, awarded its costs,

in accordance with Rule 54(b), F.R.Civ.P., as the prevailing party in this action.

/Signature/
Walter E. Black, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Kondian R. Rajaram, Plaintiff

v.

International Typographical Union, et al.,

Defendants

Civil No. B-84-2465

MAGISTRATE'S REPORT AND RECOMMENDATION

The A.S. Abell Company ("Abell"), the company defendant in this employment discrimination case, filed a motion to dismiss on June 22, 1984. 1/

1/ Paper no. 6.

Abell recently supplemented its motion, due to its recent dismissal from a companion case to this action. 2/

2/ Rajaram v. ITU, B-80-0012. See paper no. 154.

The present action was originally filed in The Circuit Court for Baltimore City, and removed on defendants' motion to this Court. Rajaram's motion to remand this action to

state court was denied. 3/

3/ Paper no. 23.

Rajaram has filed an opposition to Abell's motion to dismiss, and Abell has filed reply thereto.

This case involves a dispute based on Rajaram's allegation that defendants failed to perform in accordance with a 1977 arbitration award. In addition, Rajaram alleges a breach of the duty of fair representation with respect to the Union defendants. Because the particular facts of this case are amply documented in the record, they will not be recitred.

I.

A.

Abell argues that this action must be dismissed on several grounds: res judicata, the law of the case doctrine, the statute of limitations, and the theory that the named individual defendants are not

proper parties for a suit of this nature.

B.

In opposition to Abell's motion, Rajaram claims that the individual defendants are necessary parties to the adjudication of this case. Plant v. Laborer's International Union, 324 F. Supp. 1021 (D. Del. 1971); F. R. Civ. P. 19.

Rajaram also argues that he is entitled to a judgment in this case because a default judgment regarding the arbitration award was obtained in the Circuit Court for Baltimore City. Rajaram claims that under Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), federal courts are required to give preclusive effect to state court jedgments. Therefore, according to Rajaram, his default judgment establishes the liability of the defendants in this case. See Blonder-Tongue L[ao]ratories, Inc. v. University

of Illinois Foundation, Inc., 402 U.S. 313 (1971); Beaver v. Bridwell, 598 F. Supp. 90 (D. Md. 1984).

C.

In reply to Rajaram's opposition, Abell contends that this Court should not give any preclusive effect to the default judgment entered in state court. Although Abell thoroughly briefed this issue, the Court need not address it. Abell recently informed the Court that all the default orders in Rajaram's state court action have been vacated. 4/

4/ See paper no. 29, exhibit A.

There is thus no outstanding final state court judgment to which this Court could give preclusive effect.

II.

A.

The gravamen of Abell's motion is that this Court's prior rulings in Rajaram's

other case, Rajaram v. ITU, B-80-0012, should be given preclusive effect under the doctrine of res judicata. In 80-0012, Judge Black held that Rajaram's claims of fraudulent concealment, regarding the 1977 arbitration award, were insufficient under the test of Davis v. Edgemere Finance Co., 523 F.Supp. 1121 (D. Md. 1981). Judge Black entered an order dismissing Abell, and entering final judgment in its favor. 5/

5/ Paper no. 154 in 80-0012.

Rajaram's claims against Abell for breach of §301 of the Labor Management Relations Act, 29 U.S.C. §185 were also dismissed by Judge Black in a prior order because those claims were barred by the statute of limitations. 6/

6/ See paper no. 113 in 80-0012, adopting the Magistrate's Report and Recommendation, paper no. 107. Rajaram's Motion for Reconsideration was denied, paper no., 150, and adopted in its entirety by the Court, paper no. 154.

Several days after Judge Black dismissed Abell from 80-0012, he also entered an order dismissing several of Rajaram's claims against the Union defendants. Rajaram's claims against the Union defendants in this case are substantially similar to those that were dismissed in 80-0012.

Although only Abell moved to dismiss this action on the basis of res judicata, this Court will apply Abell's argument to the Union defendants as well. Notwithstanding the fact that res judicata is an affirmative defense under Fed. R. Civ. P. 8(c), and may be waived if not properly asserted, there are certain factors, present here, which allow the Court to raise the doctrine sua sponte. "Dismissal by the court sua sponte on res judicata grounds ... is permissible in the interest of judicial economy where both

actions were brought before the same court." Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980). The interest of judicial economy is an important factor in this case. Rajaram's first case, 80-0012, was filed in 1980, and that record is voluminous. Although this case, 84-2465 was originally filed in a state court and removed on defendants' motion to this court, it should have been consolidated with 80-0012. Be that as it may, it appears to this Court that, in the interest of judicial economy, the doctrine of res judicata can be raised on the Court's own motion and applied to the Union defendants as well.

B.

The doctrine of res judicata, as it has developed, was recaently discussed by the Supreme Court:

> The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting

terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, supra, §27. This effect also is referred to as direcat or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. See id., Introductory Note before §24. * * * * *

Migra v. Warren City School Dist. Bd. of Educ., ___ U.S. ___, 104 S. Ct. 892, 894 n. 1. (1984). See also Kaspar Wire Works, Inc. v. Leco Engineering & Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1978); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4402; Restatement (Second), Judgments §19 (1982).

This Court is unclear as to Rajaram's motives in originally filing this action in state court. Regardless of his reason, it is clear that this action presents issues of federal law, and for that reason the case was removed and remand was denied. 7/

7/ See paper no. 23.

The conclusions of law and fact in my Report and Recommendation denying Rajaram's motion to remand this case to state court are not at issue, in that no exceptions to that Report were filed. Fed. R. Civ. P. 72; United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, ___ U.S. ____, 104 S.Ct. 2395 (1984).

Rajaram's complaint, originally filed in state court is in two counts: In count I, Rajaram alleges that the Union defendants and associated individuals did not protect his interests and rights under the arbitration award, and further, that

they failed to disclose information to him concerning the award. Rajaram also claims that those defendants failed to honor their contractual obligation to represent him in good faith. In count II, Rajaram alleges that Abell and two individuals failed to perform under the terms of the arbitration award.

C.

Rajaram's complaint in count I, regarding the Union defendants' failure to protect his rights, is, in essence, an allegation of a breach of the union's duty of fair representation. This claim was dismissed in 80-0012 by Judge Black. 8/

8/ See paper no. 155 in 80-0012.

Rajaram's claim of fraudulent concealment (refusing to disclose the terms of the arbitration award) against both the union defendants and Abell was also previously dismissed by the Court in 80-0012. 9/

9/ See paper no.'s 154 and 155 in 80-0012. See also paper no. 150 in 80-0012.

III.

The question now presented is whether, under the doctrine of res judicata, the Court's resolution of the same or similar issues in 80-0012 bars Rajaram from litigating the same in 84-2465. This Court believes that it does.

"To qualify for preclusion, a judgment must be valid, final, and on the merits." 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4432 (1981). There is no question that the Court's actions regarding Abell meet these criteria, because the judgment certainly was valid, final judgment was entered, and it was on the merits. The Court's decision regarding the Union defendants in 80-0012, although valid and on the merits, was not a final judgment, and was thus not

immediately appealable. See 28 U.S.C. §1291. However, for res judicata purposes, the finality requirement is met: Rajaram will not be prejudiced if his claims against the Union defendants in 84-2465 are barred. Because his claims in 84-2465 are the same as those in 80-0012, if and when final judgment regarding the Union defendants is entered in 80-0012, Rajaram can appeal any part of that decision which is adverse to him. He therefore has the opportunity to obtain review on the same claim in 80-0012 that would now be barred in 84-2465. "'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80,84 (1st Cir. 1961), cert. denied, 368

U.S. 986 (1962); see also, 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4434. Therefore, the Court's decision in 80-0012 with respect to the Union defendants meets the criteria necessary to apply res judicata to Rajaram's claims in 84-2465.

When Rajaram brought his first action, 80-0012, in this Court, he should have been prepared to advance all of his theories, since this court has jurisdiction to afford full relief. Even if he had believed that his action contained both state and federal claims, there most probably would have been jurisdiction to apply both state and federal law under the doctrine of pendent jurisdiction. Accordingly, all of Rajaram's theories in 84-2465 should be precluded by the disposition of 80-0012.

Rajaram may argue that because the

Court in 80-0012 denied some of his claims due to the expiration of the statute of limitations, the requirement of being "on the merits" was not met. However, where the action involves the same claim or cause of action, the court would merely look to the same source of limitations law: consequently preclusion should apply. Id. at §4441.

Rajaram may also argue that since his action in 84-2465 was pending before 80-0012 was decided, it is not truly a second action. However, such an argument would not nearly reach the essence of res judicata, as described in The Restatement (Second), Judgments §19, comment a (1982):

> The rule that a defendant's judgment acts as a bar to a second action on the same claim is based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end. These considerations may impose such a requirement even though the substantive issues have not been

> tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding, or has deliberately flouted orders of the court.

See, Adkins v. Allstate Insurance Co., 729 F.2d 974, 976 (4th Cir. 1984).

There may also be argument from Rajaram concerning the fact that, in 84-2465, several individuals were named as defendants who were not mentioned in 80-0012: thus the use of res judicata against them should not be permitted. Although the traditional rules of res judicata viewed privity narrowly, such rules have been relaxed. See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, Inc., 402 U.S. 313 (1971); Adkins v. Allstate Insurance Co., 729 F.2d 974 (4th Cir. 1984); Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967).

Moreover, the relationship between the named individual defendants and the

entity defendants falls under the principle of "virtual representation." "The most pervasive principle that extends preclusion to non-parties relies on representation by a party." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4454. "Virtual representation" precludes relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interests with a non-party. Id. at §4457. Therefore, even though the individual defendants may not have been mentioned in the decision of 80-0012, as employees or associates of the entity defendants they were represented by such entities, and they should also be able to raise the defense of preclusion by res judicata.

IV.

For the reasons stated above, I respecatfully recommend that, upon the

expiry of time allowed in Local Rule 82 and Fed. R. Civ. P. 72 for taking exception hereto, an order be entered granting defendant Abell's motion to dismiss, and dismissing case no. B-84-2465 in its entirety.

/Signature/
Frederic N. Smalkin
United States Magistrate

Dated: March 28, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM

V.

INTERNATIONAL TYPOGRAPHICAL UNION, BALTIMORE TYPOGRAPHICAL UNION NO. 12, SUNPAPERS CHAPEL OF BALTIMORE TYPOGRAPHICAL UNION NO. 12, A. S. ABELL PUBLISHING COMPANY, THEODORE J. KEES, JACK POIST, JOHN BANACH, PAUL C. BOWEN, and RICHARD BROWN

CIVIL ACTION NO. B-84-2465

ORDER AND JUDGMENT

Upon consideration of Plaintiffs' Exceptions and Objections to Report and Recommendation of the United States Magistrate, the responses thereto, and the record, and having heard the oral arguments on behalf of all interested parties at a hearing on April 11, 1986; in accordance with the Court's oral opinion rendered at the conclusion of the said hearing, IT IS, this 21st day of April, 1986, ORDERED and ADJUDGED:

1. That Plaintiffs' Exceptions and Objections to Report and Recommendation of the United States Magistrate (Frederic N. Smalkin) (Paper 32), purportedly filed by plaintiff, Kondian R. Rajaram, on behalf of a class, but treated by the Court as filed on plaintiff's behalf alone, BE, and the same hereby ARE, OVERRULED and DENIED.

2. That the Magistrate's Report and Recommendation (Paper 30), of United States Magistrate Frederic N. Smalkin, dated March 2[5], 1985, BE, and the same hereby IS, AFFIRMED and ADOPTED in its entirety.

3. That the Motion of Defendants A.S. Abell Publishing Company, John Banach, and Paul C. Bowen to Dismiss or, Alternatively, for Summary Judgment, and for an Award of Expenses, Including Attorneys' Fees (Paper 6)--being treated as a motion to dismiss --BE, and the same hereaby IS, GRANTED, EXCEPT that portion of the motion relating

to expenses, including attorneys' fees, which portion of the motion BE, and the same hereby IS, DENIED.

4. That the Motion to Dismiss (Paper 7), filed on behalf of defendants, International Typographical Union, Baltimore Typographical Union No. 12, Sunpapers Chapel of Baltimore Typographical Union No. 12, Theodore J. Kees, Jack Poist, and Richard Brown, BE, and the same hereby IS, GRANTED.

Re: Raj[o]ram v. International Typographical Union, et al.
Civil No. B-84-2465

5. That judgment BE, and the same hereby IS, ENTERED in favor of the defendants, International Typographical Union, Baltimore Typographical Union No. 12, Sunpapers Chapel of Baltimore Typographical Union No. 12, A. S. Abell Publishing Company, Theodore J. Kees, Jack Poist, John Banach, Paul C. Bowen, and

Richard Brown, against the plaintiff, Kondian R. Raj[o]ram.

6. That plaintiff's complaint against all of the defendants BE, and the same hereby IS, DISMISSED WITH PREJUDICE.

7. That the Clerk shall transmit copies of this Order and Judgment to counsel of record for all of the parties to this action.

/Signature/
Walter E. Black, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1268

FILED

FEB 25 1986

U.S. Court of Appeals

Fourth Circuit

Kondian R. Rajaram,

Appellant,

versus

A.S. Abell Publishing Company,

Appellee,

and

International Typographical Union, et ai,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge

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Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sneeden for a panel consisting of Judge Russell,

Judge Sneeden and Judge Butzner.

For the Court,

JOHN M. GREACEN
CLERK

Arbitration Hearing transcript of 1977 before Professor Myron L. Joseph, Volume I, page 6:

> MR. GARLAND: Our position is that we agreed with Mr. Kees at the time he presented his letter of December 3rd, 1976, that we would arbitrate this matter and we are following through on that agreement with Mr. Kees.
>
> ARBITRATOR: I take it then the parties agree that the grievance or the dispute, however you characterize it, has been processed properly by the parties under this prior agreement; that it has been properly appealed to arbitration and the parties agree to arbitrate the issue and be bound by the Arbitrator's determination.
>
> MR. GARLAND: Yes, sir.
>
> MR. RUBINSTEIN: Okay. Fine.
>
> ARBITRATOR: Very good.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM Plaintiff

vs.

INTERNATIONAL TYPOGRAPHICAL UNION, et. al.

Defendants

CIVIL ACTION No. B-80-0012

MOTION FOR REVISION OF INTERLOCUTORY ORDER OF COURT

Plaintiff, Kondian R. Rajaram, through his attorneys, respectfully moves the court to vacate or revise its Order of November 6, 1983, in the following manner:

1. Vacate or Revise the Adoption of the Magistrate's Report and the Granting of Defendant A.S. Abell Publishing Company's ("Abell" or "Company" or "Company Defendants") Motion to Dismiss with regard

to dismissal of Plaintiff's claims under 42 U.S.C. §§ 1985 and 1986 as being time-barred.

2. Vacate or Revise the Adoption of the Magistrate's Report and the Granting of Defendant Abell's Motion to Dismiss with regard to dismissal of Plaintiff's claims under § 301 of the Taft Hartley Act, 29 U.S.C. § 185 as being barred by the Statute of Limitations.

3. Vacate or Revise the Adoption of the Magistrate's Report and the Granting of Defendant Abell's Motion to Dismiss with regard to the assumption of jurisdiction of Plaintiff's state law contract claims.

Plaintiff moves for this Revision on the grounds that, since the date that the court made its Ruling, newly discovered, additional evidence of specific facts which clearly demonstrate the elements of misrepresentation and fraudulent

concealment on the part of Defendant A.S. Abell Publishing Co. and its agents with regard to an Arbitration Award due to Plaintiff has been discovered. These newly discovered facts weigh upon the final determination of the above mentioned causes of action and would cause the tolling of the pertinent Statutes of Limitations until such facts were discovered by Plaintiff.

Plaintiff has discovered that, until November of 1983, Defendant A.S. Abell Publishing Co., together with the Union Defendants (as previously defined in prior pleadings) maliciously and intentionally concealed from Plaintiff knowledge of the full benefits due and accruing to him as the result of an arbitration award granted by Arbitrator Myron L. Joseph on September 7, 1977.

In July of 1978, Plaintiff continued to show up for work opportunities and was

informed by both the Company (Mr. Hugh Meadowcroft) and the Union Defendants or their agents that, insofar as being provided any work opportunities at that time, none were available even though permanent position holders were absent. In effect, his position with the Company had been terminated. He was handed a form that was prepared by both the Union and Company Defendants for him to sign and told that all the money that he was entitled to receive was $1500.00. Plaintiff was told that if he did not sign the form within a 30 day period, he would not be entitled to any payments.

Plaintiff has since discovered that, as a result of the mentioned Arbitration Award, he should be entitled to receive greater compensation than that which was given him. The exact amount to which he should be entitled is, at this point in time, not

fully determined.

The specific information about the Arbitration Award was concealed from Plaintiff until he and his counsel were first able to review, as the result of discovery from the Union Defendants in November of 1983, limited documents regarding the award.

Prior to November of 1983, Plaintiff had made diligent and repeated attempts to discover specific information by requesting Admissions of Facts, filing Interrogatories and requesting Production of Documents.

He had been informed by the Union, after the arbitration hearing, that the award should cost the Company a substantial amount of money. His attempts at discovery of the result of the Arbitration Award from both the Company and the Union Defendants were thwarted by the concerted concealment efforts of both parties and by the legal

tactics of their attorneys.

The Company Defendants knew, or should have known, from the time of the arbitrator's decision, that the Plaintiff was entitled to substantially more money than they paid him as the result thereof. The Company deliberately and wantonly concealed this factual information from the Plaintiff, the Union joined in the concealment and the Company knew that they were both withholding and concealing said facts and took no action, insofar as Plaintiff has been able to ascertain, to prevent such concealment.

The documents provided by the Union Defendants in November of 1983 only indicated that the Union had taken the matter to the N.L.R.B. Plaintiff still had no specific facts regarding the details of said award which could indicate that he had not received full payment resulting

therefrom.

The Union's attorney, Mr. Rubenstein, was contacted and asked to provide further information regarding the award, including a copy of the arbitrator's determination. Although it would possibly serve to find further liability on the part of the Company and benefit Union members, the Union's attorney adamantly refused to supply the requested documents. The Arbitrator, Myron L. Joseph, was contacted and he informed Plaintiff's attorney that he could not release documents regarding the arbitration without consent of all parties. A search through the library at the University of Maryland School of Law indicated that the decision was not published.

On or about April of 1984, a copy of the transcript of the subject arbitration and resulting decision was finally obtained from the files of the N.L.R.B. under the

provisions of the Freedom of Information Act.

Without an indication of what to look for or where to search, Plaintiff, although he had diligently tried, could not have discovered sufficient factual details to establish his entitlement to a tolling of the Statute of Limitations for fraudulent concealment prior to a review of the documents supplied by the Union Defendants in November of 1983. Even after such limited discovery, it took a substantial amount of time, effort and additional expense on the part of Plaintiff and his attorneys to obtain sufficient facts to discover the factual elements of the fraudulent concealment.

At the time of the hearing regarding the above mentioned Order, the Company's attorney pleaded and argued that Plaintiff's causes of action against it

should be barred by the Statute of Limitations. At that time, and before (when a Motion for Protective Order was filed which delayed and prevented Plaintiff from obtaining discovery), the Company's attorney knew, or should have known, through being informed by his client, that the essential documentary information was being intentionally concealed by all Defendants. He knew, or should have known, that such factual documentary information would entitle Plaintiff to a tolling of the statute of limitations under the doctrine of fraudulent concealment.

The acts of the Company Defendant, as now known, demonstrate that Plaintiff is capable of proving sufficient facts to maintain actions for Conspiracy, Failure to Prevent Conspiracy, and Breach of Collective Bargaining Agreement. With jurisdiction over these substantial federal

claims, this court could assume jurisdiction over the state contract claim.

WHEREFORE, Plaintiff respectfully moves this court to Vacate or Revise its Order of November 6, 1983, reinstate A.S. Abell Publishing Company as a defending party in the above entitled case and, for the reasons set out above:

A. DENY the Motion to Dismiss filed by Defendant A.S. Abell Publishing Company with regard to dismissal of Plaintiff's claims under 42 U.S.C. §§ 1985 and 1986 as being time-barred,

B. DENY the Motion to Dismiss filed by Defendant A.S. Abell Publishing Company with regard to dismissal of Plaintiff's claims under § 301 of the Taft Hartley Act, 29 U.S.C. § 185 as being time-barred, and

C. DENY the Motion to Dismiss filed by Defendant A.S. Abell Publishing Company with regard to jurisdiction of Plaintiff's

state law contract claims.

/Signature/
EDWARD J. MAKOWSKI
1746 Eastern Avenue
Baltimore, Maryland 21231
(301) 563-0990

/Signature/
PHILLIP MIZRACH

Attorneys for Plaintiff

AFFIDAVIT

STATE OF MARYLAND, CITY OF BALTIMORE, to wit:

I HEREBY CERTIFY THAT ON THIS 15th day of October, 1984, before me, the subscriber, a Notary Public of the State of Maryland in and for the City of Baltimore, personally appeared John J. Banach, Jr. and made oath in due form of law as to the following matters and facts:

1. My name is John J. Banach, Jr.

2. I have been employed by the A.S. Abell Publishing Company since 1968.

3. I have been Vice President of Industrial Relations for the A.S. Abell Publishing Company since July, 1976.

4. In conjunction with my position as Vice President of Industrial Relations I am in charge of all contract negotiation and administration, including those duties performed with Baltimore Typographical Union No. 12.

5. During negotiations for the collective bargaining agreement which was executed in July, 1978 and effective by its terms from January 1, 1977 through December 31, 1979, the Publisher received the arbitration

decision of Myron L. Joseph dated September 7, 1977.

6. Upon receipt of this arbitration award, I told the Union across the table that the Publisher could not live with the terms of this award and that the Publisher would insist on changing the old collective bargaining agreement in order to deal with the issue of substitutes.

7. I told the Union during contract negotiations that because of diminishing work in the Composing Room, there would be no need for substitutes to work in the Composing Room.

8. In July, 1978, the Publisher and the Union agreed to a new collective bargaining agreement which changed language in prior agreements regarding substitutes. For the first time, the parties agreed in Section 13 of that collective bargaining agreement that the foreman would determine whether or not a substitute would be required to work. A copy of the language of Section 13 is attached hereto as Exhibit A. Prior to this collective bargaining agreement, a foreman had no control over whether substitutes would work in the Composing Room.

9. The parties also negotiated in Section 12 of that collective bargaining agreement the manner in which substitutes in the Composing Room would be treated. Paragraph (d) of that Section 12 indicates that those substitutes who resigned and terminated their employment would receive a lump-

sum payment of $1,500 less necessary tax and Union deductions. A copy of the language of Section 12 is attached hereto as Exhibit B.

AFFIDAVIT
Page 2
John J. Banach, Jr.

10. To the best of my knowledge, Mr. Rajaram, pursuant to Section 12(d) did in fact resign his employment in July, 1978 in exchange for the payment outlined above. A copy of Mr. Rajaram's letter of acceptance is attached hereto as Exhibit C.

/Signature/
John J. Banach, Jr., Affiant

SUBSCRIBED AND SWORN TO THE DAY AND YEAR ABOVE WRITTEN

/Signature/
Notary Public

My Commission Expires July 1, 1986

Each of the three relevant contracts between A.S. Abell Publishing Company and Batimore typographical Union No. 12, [effective (a) January 1, 1974 thruough December 31, 1976, (b) January 1, 1977 through December 31, 1979, and (c) January 1, 1980 through December 31, 1989] in Section 6 contains:

> "The General Laws of the International Typographical Union in effect at the time of signing this agreement (a copy of which is hereto attached) not in conflict with State or Federal laws, shall govern relations between the parties on conditions not specifically enumerated herein."

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KONDIAN R. RAJARAM, Appellant

versus

A.S. ABELL PUBLISHING COMPANY, Appellee

CASE NO. 85-1268

APPELLANT'S INFORMAL BRIEF

("Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessaary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

The appellant should return an original brief and one copy to the above address within 21 days of the date noted above and mail another copy to the opposing party. The appellee must respond within 14 days after being served the appellant's brief, by filing an original and one copy with the court and mailing another copy to the appellant.")

Hereunder Appellant presents his pro se answer for each of the six questions proposed by the Honorable Court.

The Court's question No. 1:

Did the district court fail to consider

important grounds for relief. If so, what grounds?

The Appellant's answer to question No. 1:

YES.

(a)(1) During 1979 Appellant tried, at least in three different law offices, to retain counsel, but was unable to do so. Appellant filed a pro se complaint in the district court (hereinafter "DC") on January 4, 1980. In that complaint Appellant requested the DC to appoint counsel if his pro se complaint would not be acceptable with the DC.

(2) Appellant had reasons for requesting assistance:

A. Appellant did not know how to sue a party, A.S. Abell Publishing Company (hereinafter "Appellee", "Abell" or "Company"), without documentary evidence.

B. Appellant feared that if he included Abell as a party solely on the

basis of an oral complaint, the DC might disregard Abell like Equal Employment Opportunity Commission (hereinafter "EEOC") did when in August 1978, it ignored oral complaints against Abell?

(3) The DC never found counsel for Appellant. Two years and eight months passed prior to the DC holding its first hearing on Appellant's pro se action and at that time the DC dismissed the complaint on grounds described as prolixity and failure to set forth short statement of claim. (See Magistrate Smalkin's Order dated August 13, 1982, Papers 38 thru 42.)

(4) Any defect of prolixity existed in the pro se complaint on January 4, 1980. The DC was holding the complaint for about 30 days (until about February 5, 1980) apparently to check and decide whether or not that pro se complaint should be sent to defendants. On or about February 5,

1980 the DC instructed the Clerk to mail out the complaint copies to the resident defendants and Appellant was instructed to serve the only non-resident defendant through marshall service, which was accomplished by Appellant. The DC did not dismiss Appellant's complaint in January or February of 1980 or make any assertion of prolixity at that time.

(5) If the DC had dismissed pro se complaint in January or February 1980 and appointed counsel, such counsel would have known how to include Abell in an amended complaint.

(b) Appellant's Request for Production of Documents from Abell (Paper 61 filed April 13, 1983), Interrogatories (Paper 65 filed May 2, 1983), and Request for Admissions of Facts (Paper 74 filed May 16, 1983) were all denied by the DC. (See Papers 106, 107 & 113.)

(c) Appellant's Motion to Vacate (Paper 146 filed October 12, 1984) the DC's Interlocutory Order (Paper 113) was denied by the DC on February 8, 1985 and final judgment was entered without giving Appellant an opportunity to amend the motion. (Appellant's Exhibit 1) (Transcript pages 49 & 50.)

(d)(1) During scheduling conference on October 19, 1984 with Judge Black of the DC, counsel (in Chambers) agreed to the suggestion of Judge Black, that in the interest of Judicial economy the matter should be sent back to Magistrate Smalkin. Appellant's counsel believed that a hearing before Magistrate would be held prior to any further Report by Magistrate. A hearing was specifically requested by Appellee, yet it was neither scheduled nor held. Appellant and his counsel believed that the bulk of the newly discovered documents and

complexity of the subjecat matters required a personal direct explanation prior to putting them into evidence, and it was felt that a then anticipated hearing before Magistrate Smalkin would be the best time to offer the new evidence.

(2) When the Magistrate issued a new report on December 14, 1984 the Appellant and his counsel were surprised. Exceptions were taken by Appellant on December 27, 1984. In January 1985 copies of the newly found evidence were made and bound. On January 29 and February 1, 1985, more than one week prior to the then scheduled de novo hearing before Judge Black the new evidence was presented to Judge Black. Judge Black rejected consideration of critical portions of that evidence because of the voluminous nature.

(3) The DC failed to allow Appellant leave to amend the motion seeking to bring

Appellee back into this action. DC failed to consider tolling the Appellant's pro se efforts, while he sought counsel and looked also to the DC to appoint counsel for him, which it never did. Two years and eight months after the action was filed by Appellant the DC dismissed the pro se complaint because of prolixity and vacated a default which had been entered.

(4) Defendant Unions, which this action alleges acted in collusion with this Appellee, caused delays at every stage of these proceedings, and paved the way for a dismissal of Appellee on limitations grounds.

(5) The DC failed to consider the lenghth of time which elapsed during the required preliminary steps, i.e., during the time Appellant was exhausting within the Union appeals according to Union Laws and the contract with Appellee, at EEOC after

Appellant had fully exhausted his within the Union appeals, delays caused by the Union Defendants' failure to respond to request by EEOC for reconciliation conference, EEOC's delays in the issuance of Right to Sue letter, and whether a tolling of limitations should be granted to the Appellant because these delays were not controllable by a layman such as the Appellant.

The Court's question No. 2:

Did the district court incorrectly decide the facts? If so, what facts?

The Appellant's answer to question No. 2:

YES.

(a) The DC failed to even consider the extensive supportive document, which Appellant was able to locate only after Discovery was ordered by Magistrate Smalkin in the end of 1983. That document, the transcript from an extensive Arbitration

proceeding, revealed the historical relationships of the parties in Case B-80-0012. The transcript also revealed to Appellant, the deception which had been perpetrated upon him and others by his Unions and Appellee acting in concert. Transcript further revealed what the Union and Appellee had agreed was to be determined by the Arbitrator, and how the issues formulated were expanded by Appellee. The award, which resulted from that Arbitration proceeding when contrasted with the letter which was sent to Appellant in August 1978, clearly show the deception which was perpetrated by Appellee with the consent of Union Defendants.

(b) The DC incorrectly concluded that Appellant had not asked the Court for assistance obtaining discovery materials. DC further concluded without factual basis that a subpoena to the NLRB would have been

quicker than a request under the Freedom of Information Act, as used by Appellant.

(c) \The DC's finding that Appellant knew nothing more in 1984 than he knew in 1980 was incorrecat, and the act of the DC's failure to take into consideration the contents of the Unpublished Arbitration transcript was also incorrect.

(d) The DC's opinion that the entry of final judgment and dismissing Appellee is consistent with Federal policy against piecemeal review and litigation is incorrect.

(e) A pro se party, who is a non-lawyer, needs special and prompt attention from the court in making a viable presentation of his case. (Waiting from January 4, 1980 until August 13, 1982 to dismiss a pro se complaint and then later dismissing claims on the limitation grounds seems contrary to the interest of justice when the

Plaintiff is acting pro se.)

(f) The default judgments (Papers 5 a through d) of 1980 against the then four resident defendants were the result of the defendants' failure to respect the DC's summonses and a cause for delay brought about by their failure to respond. At no time prior to entering default did the four defendants complain about the existence of prolixity and/or long statements of claim in appellant's pro se complaint (which was answered promptly by non resident defendant). Yet the DC vacated the default judgments.

(g) No party should be allowed immunity from discovery.

(h) No relevant and critical evidence should be rejected from consideration, when a final dismissal is contemplated.

(i) The Magistrate's Reports (made without incorporating the facts found at

National Labor Relations Board (hereinafter "NLRB") documents and other evidence) are Reports made without the benefit of an extremely relevant document, the transcript of the Artbitation proceedings.

(j) A DC should not refuse to incorporate evidence presented by a party, no matter how bulky the evidence appears or how late it emerged, particularly when it is presented to the Court more than seven days prior to rapidly scheduled de novo hearing.

(k) The DC knew, between January 4, 1980 and June 1980, that lawsuits JH-79-1826 and JH-80-0012 were concurrently pending; yet the DC did not move towards the consolidation of these two lawsuits. Appellant was without benefit of counsel.

(l) In the February 8, 1985 hearing transcript, page 46, lines 14-16 (Appellant's Exhibit 2) Judge Black states "The policy against piecemeal litigation

is not violated here because that policy extends to parties in the same case, not a different case.", but on February 7 and 8, 1985 Appellee was a party to Case B-80-0012. Judge Black should not have entered final judgment.

The Court's question No. 3:

Do you think the district court applied the wrong law? If so, what law do you want applied?

The Appellant's answer to question No. 3: The DC did not correctly apply rule 54(b) in this situation. There was no just cause for the delays which were caused by defendants in the action. Some of the delays as caused by Defendants were in violation of statutory rights of the Appellant. The rule should not have been applied against Appellant who has not been the intentional cause of any delays in this case.

(a) The rule states "...the court may direct the entry of a final judgment...only upon an express determination that there is no just reason for delay..."

(b) The Magistrate erred when he recommended entry of final judgment releasing Appellee who had never responded to discovery requests with requested information or documents.

(c) The Magistrate erred when he recommended entry of final judgment releasing appellee while he had not incorporated relevant evidence including newly discovered documentary evidence from the files of the NLRB.

(d) failing to put the arbitration transcript in evidence sooner was a "mistake, inadvertence, surprise or excusable neglect" on the part of the appellant and counsel. They had expected a requested hearing before any

recommendation from the Magistrate.

(e) no showing has been made that to subpoena NLRB materials can bring evidence any faster than requesting same under Freedom of Information Act, after document was identifiable.

(f) in order to subpoena something, an individual has to know beforehand:

(1) what to subpoena (which appellant only discovered after sifting through and analyzing documents provided by union defendants in discovery),

(2) when the subpoenaed material is to be presented,

(3) where it is to be presented.

(g) Appellant believes that the law (rule) to apply would be Rule 54(b) in its proper perspective, i.e., "the court may direct the entry of a final judgment...only upon an express determination that there is no just reason for delay."

(h) There are just reasons for delay:

(1) Abell has not responded appellant's discovery,

(2) Neither the Magistrate nor the Judge had sufficient opportunity to digest evidence obtained by the appellant from NLRB files.

(i) The DC did not provide the benefit of F.R.Civ.P. 15(a) nor did it consider F.R.Civ.P. 8 and 9(b) when those rules are viewed together. The DC misapplied the law it utilized and did not consider relevant case law to allow equitable tolling, to reach beyond a technical defense and to reach the merits of appellant's claims.

The Court's question No. 4:

Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

The Appellant's answer to question No. 4:

YES.

(a) The DC, as a result of its February 8, 1985 ruling, has allowed Appellee to benefit from deceiving the Appellant through its assertion that appellant was paid in full all benefits to which he was entitled.

(b) The DC's ruling also awards the Appellee for resisting appellant's discovery attempts.

(c) The DC Judge, on February 8, 1985, stated "Rajaram should have asked the court for help in discovery..." (Appellant's Exhibit 2).

(1) Appellant filed in the DC:

A. Paper 61, Request for Production of Documents from Abell, on April 13, 1983,

B. Paper 65, Interrogatories (25) of Plaintiff propounded to Defendant A.S. Abell Publishing Company, on May 2, 1983,

C. Paper 74, Request of Plaintiff for Admissions of Facts and Genuineness of

Documents, on May 16, 1983.

(2) Appellant has been waiting over two years for the DC's help in obtaining Discovery, yet no Discovery has been voluntarily provided by Appellee and it has consistently filed pleadings of resisting nature.

The Court's question No. 5:

What action do you want the Court to take in this case?

The Appellant's answer to question No. 5: Appellant requests this Honorable Court to grant all relief it feels just, necessary, & appropriate, and specifically requests the Court to consider:

(a) tolling limitations to the extent of time spent by appellant's unions beyond their allowed limit of four (4) months. (That would be from April 1977 till August 1978, which would be sixteen (16) months.)

(b) Tolling limitations to the extent

of time spent by EEOC beyond its six (6) month limit allowed period. (That would be from last week of February 1979 till last week of October 1979, which would be about eight (8) months.)

(c) tolling limitations additionally from first week of January 1980 through second week of August 1982 (two (2) full years and eight (8) months) due to the DC's failure on or shortly after January 4, 1980 to discover the existence of prolixity and failure to make short statement of claim in appellant's pro se complaint, and failure to dismiss it shortly after January 4, 1980.

(d) tolling limitations additionally for one month (second week of August 1982 till second week of September, 1982 when appellant retained his current counsel) due to the DC's failure to appoint counsel for the appellant (in view of request made in the pro se complaint) even after the

dismissal of pro se complaint.

(e) tolling limitations, in regard to Myron L. Joseph's Arbitration Award & Transcript, all time until April 1984 when the appellant obtained (for the first time) Arbitration related documents from the NLRB.

(f) declaring that the appellant had no documentary evidence on the basis of which to charge Abell in August of 1978 at EEOC office.

(g) declaring that EEOC failed to charge Abell in August of 1978 because EEOC would not accpet appellant's oral charges.

(h) tolling the time from August 1978 till September 1982 when the appellant retained his current counsel, because EEOC, after appellant's charge in August 1978, made no research or creative investigation in regard to Abell's possible involvement in the matters complained of by the

appellant.

(i) ordering appellee Abell to respond appellant's discovery pleadings.

(j) declaring that the DC failed to help the appellant in discovery matters contrary to what Judge Black claimed on February 8, 1985.

(k) declaring that a subpoena cannot be issued without first ascertaining what it is that should be subpoenaed, and that a subpoena may not work any faster than Freedom of Information Act request.

(l) declaring that the federal policy against piecemeal review/litigation was not sustained by the DC.

(m) declaring that appellant had reasonable excuses for his failure to exhaust Title VII remedies at the EEOC and DC levels.

(n) declaring that DC erred by not appointing counsel for appellant and by not

consolidating cases JH-79-1826 and JH-80-0012.

The Court's question No. 6:

If you think the Court should hear oral argument in this case, why do you think so?

The Appellant's answer to question No. 6:

This appeal requires oral argument, only if the Court has questions which it feels could be clarified during oral argument.

Respectfully submitted by your appellant,

/Signature/
Kondian R. Rajaram
c/o Phillip Mizrach, Esq.
1746 Eastern Avenue
Baltimore, Maryland 21231
Telephone (301) 563-0990

Appellant's mailing address:
Box 13463
Baltimore, Maryland 21203

CERTIFICATE OF SERVICE

I Edward Jack Mokowski hereby certify that on this 7th day of May, 1985, I mailed postage prepaid one copy containing the foregoing Appellant's Informal Brief (in Case No. 85-1268), two attached Appellant's Exhibits, and a Memorandum to Messrs Jeffrey P. Ayres

and Stanley Mazaroff, Venable, Baetjer & Howard, 1800 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201, attorneys for Appellee, A.S. Abell Publishing Company, and one courtesy copy was mailed or hand-delivered to each of the following:

Honorable Walter E. Black, Jr. (no exhibits)
Honorable Frederic N. Smalkin (no exhibits)

file 032

/Signature/
Edward Jack Makowski
Attorney for Appellant (Plaintiff)
in the District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Kondian R. Rajaram, et. al. Plaintiffs

versus

International Typographical Union, et. al.

Defendants

NO. B-84-2465 CIVIL DOCKET

NOTICE OF APPEAL

Notice is hereby given that Kondian R. Rajaram above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this proceeding on April 11, 1986.

FILED
APR 24 1986

Date: April 24, 1986

/Signature/
KONDIAN R. RAJARAM

29 U.S.C. §185:

(b) Responsibility for acts of agent--Entity for purposes of suit--Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor

organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(e) **Determinataion of question of agency.**

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

42 U.S.C. §1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1994. **Peonage abolished**

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void. (R.S. § 1990.)

42 U.S.C. §1985. **Conspiracy to interfere with civil rights**

First. ....

Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of

impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection

of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such

injury or deprivation, against any one or more of the conspirators. (R. S. § 1980.)

42 U.S.C. § 1986. **Action for neglect to prevent conspiracy**

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USCS § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have

such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. (R.S. § 1981.)

42 U.S.C. § 2000e. **Definitions**

For the purposes of this title [42 USCS §§ 2000e-2000e-17]--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (a) the United States, a corporation wholly owned by the Government of the United

States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS § 501(c)], except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or

employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(f) The term "employee" means an indivudial employed by an employer, except that the term "employee" shall not include any person electaed to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the

constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. § 2000e-2. **Discrimination baecause of race, color, religion, sex, or national origin**

(a) Employers. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5. **Prevention of unlawful employment practices**

(e) Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after

the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved.

(1) If within thirty days aftaer a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the

case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c)

or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in

such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on

the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States disctict court and each United States court of a place subject

to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e-2000e-17]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28 USCS §§ 1404, 1406], the judicial district in which the respondent has his principal office shall in all cases

be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge

has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

42 U.S.C. § 2000e-10. **Notices to be posted**

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this title [42 USCS §§ 2000e-2000e-17] and information pertinent to the filing of a complaint.

(b) A willful violataion of this section shall be punishable by a fine of not more than $100 for each separate offense.

(July 2, 1964, P. L. 88-352, Title VII, § 711, 78 Stat. 265.)

FEDERAL RULES OF CIVIL PROCEDURE,

Rule 8. **General Rules of Pleading**

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * * *

(c) Affirmative Defenses. In pleading to a preceding pleading, a paraty shall set forth affirmatively accord and

satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

* * * * * *

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. (As amended Feb. 28, 1966, eff. July 1, 1966.)

FEDERAL RULES OF CIVIL PROCEDURE,

Rule 15. **Amended and Supplemental Pleadings**

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * * * *

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. (As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

FEDERAL RULES OF CIVIL PROCEDURE,

Rule 18. **Joinder of Claims and Remedies**

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment

establishing the claim for money. (As amended Feb. 28, 1966, eff. July 1, 1966.)

FEDERAL RULES OF CIVIL PROCEDURE,

Rule 9. **Pleading Special Matters**

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FEDERAL RULES OF CIVIL PROCEDURE,

Rule 54 **Judgments; costs**

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court

may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicataes fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

FEDERAL RULES OF CIVIL PROCEDURE,

Rule 56. **Summary Judgment**

(c) Motion and Proceedings Thereon. The

motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence

before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Arbitration Hearing transcript of 1977 before Professor Myron L. Joseph, Volume II, page 19:

> THE ARBITRATOR: Excuse me. Let's make the record clear. This did not come from me. It became necessary for me to say I have determined because the Company came forward and said that one of its arguments in support of its position was that it had that right. Since that is so, it then becomes necessary for me to do it. I don't want the record to indicate that I enlarged my jurisdiction. I did not.
>
> MR. GARLAND: Correct.
>
> THE ARBITRATOR: Thank you. Let's go beyond this since I now have the floor.

MORNING EVENING SUNDAY

THE SUN

THE A.S.ABELL COMPANY, PUBLISHER

BALTIMORE, MD. 21203

August 22, 1978

Mr. Kondian R. Rajaram

P.O. Box 13463

Baltimore, Maryland 21203

Dear Mr. Rajaram:

In accordance with arbitrator Myron L. Joseph's Award and Opinion dated September 7, 1977 regarding coverage of dormant situations in the Composing Room after 30 days, please be advised of the following.

The Sunpapers and Baltimore Typographical Union #12 have reviewed all of the records for the period from December 5, 1976 through December 31, 1976 and have ascertained that you are entitled to back pay including vacation credits earned in the amount of $246.07 in full compliance with the

arbitrator's award.

The appropriate pension credit for the shifts paid will be forwarded to the I.T.U. Negotiated Pension Plan Fund.

In accordance with the wage scales as provided for in the new agreement signed on July 6, 1978, you will also find enclosed a check covering the retroactive pay for those shifts which you worked.

Sincerely,

/Signature/
Paul C. Bowen
Manager, Labor Relations

/h

cc: Baltimore Typographical Union #12

NATIONAL LABOR RELATIONS BOARD
REGION 5
Candler Building - 4th Floor
109 Market Place
Baltimore, MD 21202 (301) 962-2822

March 23, 1984

Mr. Kondian R. Rajaram
c/o Mr. Edward Makowski
1746 Eastern Avenue
Baltimore, MD 21231

Re: Freedom of Information Act Request

Dear Mr. Rajaram:

This is in reply to your request, under the Freedom of Information Act, to examine the files in A.S. Abell Company, Cases 5-CA-8741, 9020 and 9433. Please be advised that the file in Case 5-CA-8741 was closed in 1977, was sent to the Federal Records Center in 1980 and was recently destroyed by the Center. The files in Cases 5-CA-9020 and 9433 were closed in 1978 and were sent to the Federal Records Center in 1981. Those two filed have been requested from the Center, a process which takes approximately four weeks. Upon receipt of

the files, this office will respond to your request.

Very truly yours,

/Signature/
Leonard R. Miller
Acting Regional Director

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

CHAMBERS OF

WALTER E. BLACK, JR.

UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET

BALTIMORE, MARYLAND 21201

(301) 962-0107

September 21, 1984

Edward Jack Makowski, Esquire
1746 Eastern Avenue
Baltimore, Maryland 21231

Phillip Mizrach, Esquire
1746 Eastern Avenue
Baltimore, Maryland 21231

Bernard W. Rubinstein, Esquire
Patty L. Parsons, Esquire
10 Light Street, Suite 2400
Baltimore, Maryland 21202

Stanley Mazaroff, Esquire
Jeffrey P. Ayres, Esquire
1800 Mercantile Bank & Trust Building
Two Hopkins Plaza
Baltimore, Maryland 21201

Ronald Rosenberg, Esquire
Messrs. Van Arkel, Kaiser, Gressman, Rosenberg & Driesen
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Rajaram v. International Typographical Union et al. Civil Actions No. B-80-0012 and B-84-2465

Ms. Parsons and Gentlemen:

Confirming our telephone conversations with Messrs. Makowski, Rubinstein, and Mazaroff, I have scheduled a status conference in the captioned cases for Friday, October 19, 1984, at 9:00 a.m. The primary purpose of the meeting is for counsel to bring the Court up-to-date as to the posture of both of these cases and to schedule further proceedings. For this latter reason, I request that lead trial counsel make arrangements to attend the meeting.

I am aware that there still remains pending and unresolved various Objections of the parties to Magistrate Smalkin's

Report and Recommendation in Civil No. B-80-0012. These unresolved Objections will be included on the agenda of our meeting.

Upon receipt of this letter, will each of you please call my secretary and confirm your attendance at the October 19 conference.

Sincerely yours,

/Signature/
Walter E. Black, Jr.

WEBJr:ps

c.c. Court Files

MORNING EVENING SUNDAY

THE SUN

THE A.S. ABELL COMPANY, PUBLISHER

BALTIMORE, MD., 21203

December 2, 1976

Mr. Theodore J. Kees, President
Baltimore Typographical Union #12
817 N. Calvert Street
Baltimore, Maryland 21202

Dear Mr. Kees:

Effective Sunday, December 5, The A. S. Abell Company will cover any dormant situation up to a thirty day period only. No new situations will be created until further notice and substitutes presently covering dormant situations shall be returned to the sub board.

Any situation holder absent for a reason other than illness shall lose all contractual benefits after thirty days of absence in any calendar year.

Employees absent because of incapacitating illness or serving the Local or International Typographical Unions will be returned to their situation upon return to work. The Company will require proof of illness to retain benefits.

Therefore, in accordance with Section 41 of our agreement, the following situations shall be considered dormant in that to date, they have exceeded the thirty day period:

T. Kees
W. Crane
L. Regulski
E. Jakowski
R. Perrine

The substitutes presently covering the above dormant situations shall be returned to the sub board.

Sincerely,

/Signature/
John J. Banach

cc: Mr. Hugh Meadowcroft
Mr. Jack Poist